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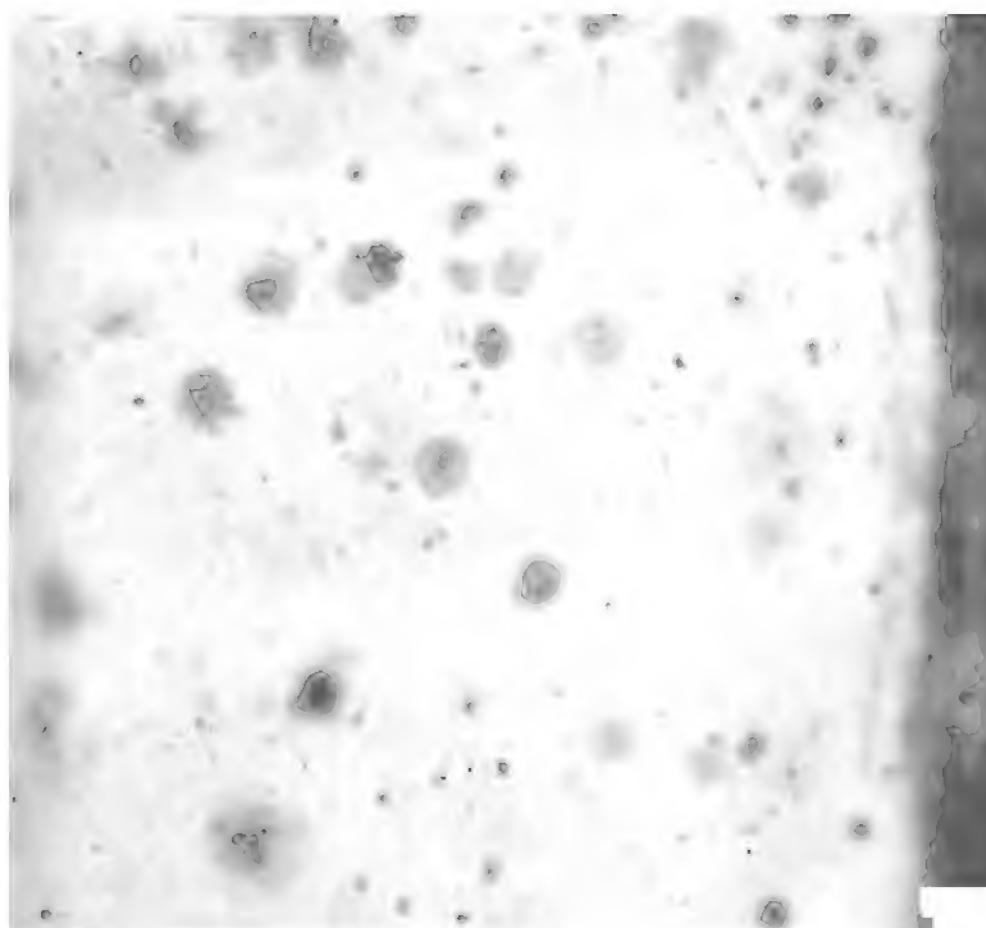
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

HILARY TERM, 6 WILL. IV.

TO

TRINITY TERM, 6 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.



VOL. I.



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JUDGES

OF THE

COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.



The Right Honorable JAMES, Baron ABINGER,
Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.



ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

ERRATA.

Page 27, line 27, *for* was at an end, *read* was not at an end.

172, line 3, *for* are, *read* is.

434, note (a), *for* Adol., *read* Ald.

439, line 28, *for* Rust, *read* Burt.

546, note (b), *for* 56, *read* 78.

548, note (b), *for* 151, *read* 131.

595, note (a), *for* 1 B. & Ald., *read* 2 B. & Ald.; and the references in
notes (b) and (c) should be transposed.

598, line 18, *for* parties, *read* factors.

A

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REPORTS OF CASES
ARGUED AND DETERMINED
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The Courts of Exchequer
AND
Exchequer Chamber.

HILARY TERM, 6 WILL. IV.

MEMORANDA.

1836.

IN the early part of this Term, the Lords Commissioners having resigned the Great Seal, the same was delivered to the Right Honourable Sir C. C. Pepys, Master of the Rolls, as Lord Chancellor; and he was created a Peer by the title of Baron *Cottenham*, of *Cottenham*, in the county of *Cambridge*.

Henry Bickersteth, Esquire, K. C., was appointed Master of the Rolls, and raised to the peerage by the title of Baron *Langdale*, of *Langdale*, in the county of *Westmoreland*.

Their Lordships took their seats in their respective Courts on *Tuesday*, the 19th of *January*.

REGULÆ GENERALES—HIL. TERM, 6 WILL. IV.

1. **WHEREAS**, by the stat. 4 *Hen. 4*, c. 18, it was enacted, “ That all the attorneys shall be examined by the Justices, and by their discretion their names put on

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the roll, and they that be good and vertuous and of good fame shall be received and sworn well and truly to serve in their offices." And whereas by the stat. 3 *Jac.* 1, c. 7, s. 2, it was enacted, " That none shall from henceforth be admitted attorneys in any of the King's Courts of Record but such as have been brought up in the same Courts or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition, and that none be suffered to solicit any cause or causes in any of the Courts aforesaid but only such as are known to be men of sufficient and honest disposition." And whereas by a rule made in *Michaelmas* Term, 1654, in the Courts of *King's Bench* and *Common Pleas*, it was ordered that the Courts " should once in every year in *Michaelmas* Term nominate twelve or more able and credible practisers, to continue for the ensuing year, to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination: and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and, being approved, to be presented to the Court and sworn." And whereas by the stat. 2 *Geo.* 2, c. 23, s. 2, it was enacted, " That the Judges, or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney: and if such Judge or Judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively should, and they were thereby authorized, to administer to such persons the oath thereafter directed to be taken by attorneys: and after such oath taken, to cause him to be admitted an

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attorney of such Court respectively." And whereas in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner hereinafter mentioned, It is Ordered, that the several Masters and Prothonotaries for the time being of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer* respectively, together with twelve attorneys or solicitors, be appointed, by a rule of Court in *Easter Term* in every year, to be examiners for one year: any five of whom (one whereof to be one of the said Masters or Prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next *Easter Term*, subject to such appeal as hereinafter mentioned, no person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. It is further Ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

3. And it is further Ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of *King's Bench*, upon which no fee or gratuity shall be received, which application shall be heard

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in *Serjeants' Inn Hall*, by not less than three of the Judges.

4. And whereas the Hall or building of the Incorporated Law Society of the United Kingdom, in *Chancery Lane*, will be a fit and convenient place for holding the said examination, and the said Society have consented to allow the same to be used for that purpose : It is further Ordered, that until further order such examinations be there held on such days, being within the last ten days of every Term, as the said examiners or any five of them shall appoint ; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said Society at their said Hall, which notice shall also state his place or places of residence or service for the last preceding twelve months ; and in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further Ordered, that three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months ; and the Master or Prothonotary, as the case may

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be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables under convenient heads, and affix the same, on the first day of Term, in some conspicuous place within or near to and on the outside of each Court.

6. And whereas it is expedient that upon the re-admission of attorneys the Judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance, It is further Ordered, that at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the Master or Prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of *King's Bench*; and the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

(Signed by all the Judges.)

WHEREAS by the act of the 3 & 4 *Will. 4*, c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute passed in the sessions of Parliament holden in the 5th and 6th year of the reign of King *Edward* the 6th, intituled, "An Act for keeping Holidays and Fasting Days," shall be kept or observed in the Courts of Com-

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mon Law, or in the several offices belonging thereto, except *Sundays*, the day of the *Nativity* of our *Lord*, and the three following days, and *Monday* and *Tuesday* in *Easter* week : It is hereby Ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said Courts, viz.—*Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of term, but not otherwise : the *Birthday* of our Lord the *King*, the *Birthday* of our Lady the *Queen*, the day of the *Accession* of our Lord the *King*, *Whit Monday*, and *Whit Tuesday*.

(Signed by all the Judges.)

PRICE v. WILLIAMS, Clerk.

If an incumbent contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of his contract.

A contract provided, that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—

Held, that it was not neces-

sary to aver that a lease was tendered to the lessor for execution.

The declaration set out the agreement in terms; it contained words of present demise for fourteen years, but stipulated also for the execution of a future lease :—*Held*, that the declaration need not allege expressly what the agreement amounted to in law—whether it was an actual demise, or only an agreement for a demise.

A demurrer to the whole of a declaration on which several breaches are assigned, on the ground that one of the breaches is ill assigned, is too large, if it appear that any one breach is well assigned, and the plaintiff is entitled to judgment.

ASSUMPSIT.—The declaration stated, that the defendant, before and at the time of making the agreement, promise, and undertaking thereafter mentioned, was vicar of the vicarage of *Lampeter Pontstephen*, in the county of *Cardigan*, and was seised in his demesne as of freehold, in right of his said vicarage, of and in the messuage, tenement, lands, and premises in the said agreement mentioned and described; and being so seised, on the 3rd of *September*, 1824, it was agreed upon between the defendant of the one part, and the said plaintiff of the other part, as follows :—First, the defendant, in consideration of the yearly rent and agreements thereafter mentioned, and on the part of the plaintiff to be paid,

done, and performed, by those presents agreed to set and let to the plaintiff all that messuage, &c. commonly called the glebe, otherwise the *Bryn*, together with all the cottage and vicarage-house thereunto belonging, in the parish of *Lampeter Pontstephen*, in the county of *Cardigan*, to hold the same unto the said plaintiff, from the 25th of *March* then next ensuing, for the term of fourteen years, at and under the yearly rent of 130*l.*, payable half yearly, that is to say, on the 29th of *September* and the 25th of *March*, yearly; the first payment to commence and be made on the 29th of *September*, 1825: secondly, that the said plaintiff should be at liberty to let in parcels, or entirely, any part of the said premises, or the whole, to any tenant or tenants that the said plaintiff might deem proper; and lastly, that a lease should be drawn, prepared, and executed by and between the landlord and tenant, if required by either of them, at the sole expense of the landlord only, as agreed upon. The declaration, after averring mutual promises, proceeded thus:—And the said plaintiff avers, that although he the plaintiff did demand and require of the defendant that he should procure a lease to be executed to him the said plaintiff of the said premises, to wit, on the 20th of *January*, 1834, and although the plaintiff had, from the time of making the said agreement, been ready and willing to execute such lease on his part, yet the said defendant wholly neglected and refused to procure a lease to be executed to him the said plaintiff of the said premises, when requested by the said plaintiff so to do, according to the true intent and meaning of the said agreement; and the plaintiff further says, that after the making of the said agreement, and whilst the said plaintiff was so possessed of the said premises, the said defendant resigned the said vicarage, and one *Llewellyn Llewellyn*, clerk, doctor in divinity, was duly presented, instituted, and inducted to the same, whereby the said *L. L.* became seised of the said

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premises as in his demesne as of freehold, in right of his said vicarage; and being so seised, the said *L. L.*, in *Michaelmas* Term, 1833, brought an action of ejectment in his Majesty's Court of *King's Bench* against the said plaintiff, to recover possession of the said premises, of which said action the said defendant had notice, but wholly neglected and refused to defend the same: whereupon the said *L. L.* obtained judgment in the said action, and issued a writ of possession thereupon: whereby the said plaintiff was turned out of possession of the said premises, *per quod* &c.

Special demurrer, assigning for causes, that although it was alleged that the plaintiff demanded and required the defendant to procure a lease to be executed to the plaintiff, it was not averred that any lease was tendered to the defendant for execution; and further, that it was not possible to discover from the declaration, whether the averment that the defendant resigned the living, and that his successor ejected the plaintiff, was intended for a special statement of damage, or as a breach of the agreement declared upon, or of some agreement to be implied therefrom, which ought to have been expressed in the declaration; and further, that it was uncertain whether the plaintiff by his declaration meant to plead the contract there stated as amounting to an actual demise, or as being merely an agreement for a lease. Joinder in demurrer.

The following point was also marked for argument in the margin:—"The defendant, in support of this demurrer, means to insist, amongst other things, that there was an implied agreement in the contract declared upon, that the tenancy was to enure so long only as the defendant continued vicar."

The case was argued in *Trinity* Term by—

E. V. Williams, in support of the demurrer.—There

are four objections to this declaration. *First*, the plaintiff was bound to have stated positively whether the instrument declared on was an actual demise, or only an agreement for a future demise. It is not sufficient merely to state the agreement between the parties in terms; he must go on to assign a legal meaning to it: *Chester v. Wilan* (a); *Monnington v. William* (b); *Osmere v. Sheafe* (c). If in fact the agreement amounts to a demise, the pleader should have so stated it, and not have left it to the Court to collect it. On the face of the agreement itself it is very ambiguous which it purports to be. The words, "agrees to let, &c." may not amount to words of present demise: on the other hand, the agreement for a future lease is also of equivocal effect. The Court, therefore, cannot see whether the declaration goes upon an eviction from an actual demise, or on an agreement, with a breach of covenant for further assurance, the eviction being stated only as aggravation of that breach. On a mere agreement for a lease, the party could not assign, as a substantive breach, that he was evicted. And if the eviction is the breach of which the plaintiff complains, he must state an actual demise, else the Court cannot imply a covenant for quiet enjoyment, which is necessary to sustain that breach. Again, if it was an actual demise, the damages would be merely nominal, because the plaintiff would sustain no damage by not having further assurance in the shape of a fresh lease; nay, a future lease would be a prejudice to him, because on this parol demise there would be no estoppel, and he might shew that the vicar's interest had expired, whereas the new lease by deed would operate as an estoppel, inasmuch as the vicar would then have nothing in him. The declaration, being subject to these ambiguities, is bad.

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(a) 2 Saund. 97, and note (2).

(b) 1 Ventr. 109.

(c) Carth. 308.

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Secondly. It does not distinctly appear whether the allegation, that the defendant resigned the living, and that his successor ejected the plaintiff, is intended as a substantive breach of the agreement, or merely as a special statement of damage.

Thirdly. The declaration ought to have contained an averment, that the plaintiff tendered a lease to the defendant for his execution. It would clearly be so as between vendor and vendee: *Sugd. Vend.* (7th edit.) 229; *Baxter v. Lewis* (a). There is no case directly in point as between lessor and lessee, but it is submitted that the same rule ought to prevail. It will be said, the rule of law is altered in this case by the agreement that the lessor shall be at the sole expense of the lease; but that only applies to the expenses of execution; or if it does, it is still the lessee's duty to prepare the proper form of conveyance; his being relieved from the expense makes no difference in that respect. Again, it may be objected, that there is no use in tendering a lease, the estate being out of the proposed lessor; but that makes no difference as to the legal duty of the party; in the same manner as it is necessary to present a bill of exchange for payment, although the acceptor is known to be a bankrupt.

Lastly. It is, by tacit implication of law, a term of the agreement, that it should cease on the defendant's ceasing to be vicar: *Wheeler v. Haydon* (b).

John Evans, contra.—The last point is the only one that goes to the foundation of the action. The case of *Wheeler v. Haydon*, as reported in *Croke*, is certainly an apparent authority in support of the objection: but from the report of the same case in *Brownlow and Bulstrode* (c), and the reference to it in *Bac. Abr., Leases*, F, it appears

(a) Forrest, 61.

(b) Cro. Jac. 328.

(c) Brownl. 135; 3 Bulst. 83.

that there was no express decision on the point, which was only a by-point in the case. But *Rudge v. Thomas* (a) is a direct authority that the resignation by the parson is a breach of his contract to demise for a term of years. Where the contract is entered into without qualification, the party is bound fully to perform it, and cannot defeat it by his resignation.

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In the next place, the plaintiff was not bound to tender a lease. The first act, viz. the procuring of the lease on request, was to be done by the defendant; and the declaration avers that the request was made. The defendant was bound also by the agreement to be at the whole expense of preparing the lease; he, therefore, was the party by whom it was to be prepared. It cannot be said that the plaintiff was bound to lay out any money whatever; but he could not procure the lease to be tendered without doing so.

Thirdly. It is immaterial whether the eviction be alleged as a special statement of damage, or as a distinct breach: if it be a sufficient breach that the defendant did not procure the lease, that is enough. For if the rest be only a statement of special damage, that is no ground of demurrer; if it be a distinct breach, that is no ground of demurrer to the whole declaration; the demurrer, therefore, is too large, and the plaintiff is entitled to judgment on the good breach: *Pinkney v. Inhabitants of East Hundred of Rutland* (b); *Powdick v. Lyon* (c); *Amory v. Brodrick* (d). But no particular form of words is, in fact, necessary to the statement of a breach: *Charnley v. Winstanley* (e).

Lastly. It may be admitted, that a *deed* must be pleaded according to its legal effect. The authorities cited refer to the different kinds of grants, and to the particular words

(a) 3 Bulst. 202.

(b) 2 Saund. 379.

(c) 11 East, 565.

(d) 5 B. & Ald. 712; S. C. 1 D. & R. 361; 2 Chitty, 329.

(e) 5 East, 266; 1 Smith, 433.

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necessary to pass particular interests as between particular parties. But here, supposing this to amount to an actual demise, though the estate is defeated, the party may be sued upon his contract. It cannot be necessary to say, "and the plaintiff avers that the said agreement amounts to an actual demise." Whether it did or not, the breaches are of such a nature as entitle the plaintiff to recover.

Williams, in reply.—It must be admitted, that *Wheeler v. Haydon*, as reported in *Bulstrode* and *Brownlow*, is not a direct authority for the last position asserted by the defendant. The demurrer is not too large; it is true, if the whole of either breach were good, the judgment might be confined to that; but neither breach is free from the ambiguity arising from the uncertainty whether this is alleged as an actual demise, or an agreement to demise. It cannot be seen whether the first breach is ancillary to the eviction, or whether the second, the eviction, is ancillary to the breach of covenant for further assurance. It is the same in effect as if the plaintiff had said, the defendant demised or agreed to demise.

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—One objection to the plaintiff's right to recover on this declaration was, that there was an implied agreement in the contract declared upon, that the tenancy was to enure so long only as the defendant continued vicar. This objection was founded on the case of *Wheeler v. Haydon* (a), in which the declaration for not setting out tithes stated the plaintiff's title, by lease of tithes by the parson for six years, "if he lived so long, and continued parson there;" and proof of a lease for six years, "if he lived so long," was held to support the averment; for the

(a) Cro. Jac. 328.

condition, "if he so long continued parson," is no more than what the law speaks. From the report of the same case in *Brownlow*, 135, the decision upon this point is said to have been adjourned in consequence of an opinion of *Houghton's*, and the Court to have been equally divided: it appears, however, from the report in 3 *Bulst.* 83, to have been finally decided. Be that as it may, the case decides this point merely, that a lease by a rector, whatever its terms are, operates in point of law as a demise so long only as he continues parson, for he could not pass a greater interest. The declaration does not describe the contract between the parties, but the estate which passed by demise; and the case closely resembles that of *Pike v. Eyre* (a). It does not, however, admit of a doubt, but that where the contract between the parson and tenant is for a term of years, a breach of such contract is committed if the parson resigns: *Rudge v. Thomas* (b). This objection, therefore, cannot prevail. The next was, that the breach for not executing a lease was ill assigned, because it was not averred that a lease was tendered by the plaintiff.

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But as the lease was to be prepared at the sole expense of the defendant, he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but where all that is stipulated for is, that it shall be prepared at the expense of the lessor, and there is no context to explain it, it must be intended that the lessor is to prepare it also. This breach is, therefore, well assigned.

The next objection is, that the allegation, that the defendant resigned the living, and that his successor ejected the plaintiff, is so made, that it cannot be known whether

(a) 9 B. & C. 909; 4 Man. & R. 661.

(b) 3 Bulst. 202.

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it be a breach of agreement, or special damage; but as the demurrer is to the whole declaration, and the other breach is well assigned, the demurrer is too large, and this objection cannot prevail, supposing it was otherwise valid; and we think it was not.

The last objection is to the whole declaration. It is, that it is uncertain whether the plaintiff pleads the contract as a demise, or as an agreement for a lease; and if the former, it is urged that the rule of law is, that it ought to be pleaded according to its legal effect. There is no doubt but that in deducing title, it is the established rule that conveyances are to be pleaded as they operate; for which several authorities were cited, to which that of *Moore v. Earl of Plymouth* (a) may be added; but here the plaintiff does not deduce the title to the property by lease; he is declaring on the contract of the defendant that he shall hold for a term of fourteen years, and suing for a breach of that contract; and there is a sufficient contract to that effect alleged in this declaration, for it is pleaded as an agreement that the plaintiff shall hold for fourteen years, and also that a regular lease should be executed, if required, but only in that case. Our judgment must be for the plaintiff.

Judgment for the plaintiff.

(a) 5 B. & Ald. 70.

THOROTON and Others v. WHITEHEAD.

A declaration contained one count for double rent, on the 11 Geo. 2, c. 19, s. 18, and another count for use and occupation. The Court refused a rule to strike out one of the two counts.

THIS was an action of debt on the 11 Geo. 2, c. 19, s. 18, for double rent, of premises occupied by the defendant, at a rent of 35*l.* 4*s.* *per annum*; with a count for

use and occupation. The Court refused a rule to strike out one of the two counts.

use and occupation. The particulars of demand stated, that the plaintiff claimed the sum of 70*l.* 8*s.* for rent of the said premises.

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J. Bayley moved for a rule to shew cause why one of the counts should not be struck out. He contended, that the introduction of both was in breach of the 5th rule of *H. 4 Will. 4*; and referred to *Lawrence v. Stephens* (a) as an authority to that effect. [*Parke, B.*—We doubted very much afterwards whether we ought to have granted the rule in that case. Surely these are distinct subject matters of complaint; one is for a penalty, the other for the enjoyment of the land.] The plaintiff shews, by the amount stated in his particulars, that he goes for the double value, and does not seek to recover in respect of the occupation of the land. [*Alderson, B.*—Could he recover the double value on the count for use and occupation?] He may possibly be estimating the single value at the double rent.

PARKE, B.—I think no clear or decided opinion was expressed in *Lawrence v. Stephens*; but at all events, I am of opinion that there do appear in the present case distinct subject matters of complaint. The plaintiff cannot recover on both, and must shape his case quite differently upon each. Then, if the defendant applied to strike out the second count because the plaintiff does not profess to go for use and occupation in his particular, the answer would be, that that was only a mistake in the particular, which could not mislead the defendant.

ALDERSON, B.—Perhaps the defendant is, in strictness, entitled to a rule to strike out the second count, on the ground that, according to the particular, the plaintiff can

(a) 3 Dowl. P. C. 777.

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give no evidence on that count at the trial. But the only consequence would be, that the plaintiff would amend the particular.

Rule refused.

JENKINS v. TRELOAR.

A declaration contained one count, claiming a fee or reward, in the name of metage, on coals imported into the port of *Truro*, alleged to be due to the plaintiff as lessee, under the corporation of *Truro*, of an ancient office of meter, to which the fee was stated to be incident; and another count, claiming the same sum as a port duty:—*Held*, that these counts were only different statements of the same subject matter of complaint, within the meaning of the rule of *H. T. 4 Will. 4*, and that one of them must be struck out.

THIS was an action by the same plaintiff as in the case of *Jenkins v. Harvey* (a), for the same duty of 4d. per chaldron on coals imported by the defendant into the port of *Truro*. The declaration contained two counts: the first being the same as the first count of the declaration in *Jenkins v. Harvey*, except that the metage was not claimed as an *immemorial* payment; the second, the same as the fifth count in that case, claiming it as a port duty.

Crowder, for the defendant, obtained a rule to shew cause why one of these two counts should not be struck out of the declaration, on the ground that they were only varied statements of the same subject matter of complaint, within the meaning of the rule of *H. T. 4 Will. 4* (general rules and regulations, s. 5) The same application had been previously made at chambers to *Parke*, B., who was then of opinion that the case did not come within the rule, and refused to make an order. The plaintiff's attorney, on that occasion, engaged, in case his Lordship should be of a contrary opinion, to give distinct evidence on each count.

Cowling now shewed cause.—The provisions of the new rules on this subject are to be looked at with refer-

(a) 1 C. M. & R. 877; 2 C. M. & R. 391.

ence to the alteration which has taken place in the law of variance. Before the statute 3 & 4 *Will.* 4, c. 42, variances were deemed objections in substance to a party's recovering, although they did not affect the merits of the case. It was therefore necessary to have a multiplicity of counts, in order to escape that consequence. But when the law of variance was modified and relaxed by that statute, the new rule, limiting the use of several counts, was introduced in consequence of that change; but it is quite apparent from the terms of it, that it was never intended to prevent a plaintiff from recovering the same sum of money in different ways. It meant only that the plaintiff should not be allowed to state the same transaction in different ways in point of fact, in several counts: but it does not apply, where different rights in point of law result from the same statement of facts; because to that case the law of variance was not applicable, but only to the case of different statements of facts; to which alone the power of amendment given by the statute also applies. The several examples subjoined to the rule are instances of different statements of the same transaction in point of fact, where the Judge might amend; *e. g.* "counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money;"—"two counts upon the same charter party," &c., &c. [*Parke, B.*—The example most difficult to distinguish in principle from the present case is, that of "counts for not accepting and paying for goods sold, and for the price of the same goods to be paid in money," which are not to be allowed together.] Those are different statements of the same transaction; one stating it as an executed, the other as an executory, contract. But "a count for freight on a charter party, and for freight *pro rata itineris*, on a contract implied by law, are to be allowed;" that is an instance where, from the same transaction, accrue two dif-

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ferent rights in point of law, which therefore the party may state in different counts. In the present case, one state of facts only is to be proved; but the plaintiff says, on those facts I have these rights:—either a right to a metage, or a right to a port duty. Another test is, whether the plaintiff, if he went to trial on one of these counts only, and was nonsuited, on the ground that he had misstated his right, might not sue again on the other right? It is submitted that he might, and that the defendant could not plead the former judgment in bar. If so, he may surely join both claims in the same declaration. The real meaning of the rule was, that the plaintiff should not have two counts, where, if his statement were wrong in one, the Judge might amend under the act. In this case, it is submitted, he could not amend a port duty into a metage, or the contrary. The pleader has a right to say, the Court ought not to throw it on him to state which implication of law arises from these facts. In *Triebner v. Duear* (a), *Tindal*, C. J., says, “The object of these new rules was to prevent the record from being loaded with unnecessary repetitions of pleas, which were the same in effect, and addressed only to one ground of defence; not to prevent a party from putting in distinct answers to the same claim.” The same observation applies to distinct *rights* to the same claim.

Crowder, contra.—It may perhaps be admitted, that the proper interpretation of the new rules has reference to the law of variance, as altered by the 3 & 4 *Will.* 4, c. 42, although that is not so expressed in terms. But the test proposed on the other side, viz. whether the plaintiff could maintain a second action, would apply to every case of variance before the new rules; as, for instance, to a contract without and with a condition. The instances

(a) 1 Bingham N. C. 266; 1 Scott, 102; 3 Dowl. P. C. 133.

given in the rules are quite different and distinct in principle from the present. There is no apparent reference to the trial of a *right*, as distinct from any other case. And the plaintiff here in truth goes for the breach of a contract, which may be the one thing or the other. It is clearly the same subject matter of complaint, as much as the cases of not accepting a bill for goods sold, and not paying the price of them. In that case, the legal claims, and the form of the count, are as different as possible; the one arising on a special agreement, the other on an implied contract. [*Parke, B.*—If it be a distinct right, is it not a distinct subject-matter of complaint? Whatever be the right, whether derived from prescription, or from grant in modern times, the legal *assumpsit* arises on that, so that the *right* is the question in dispute.] A right means no more than the plaintiff's claim to sue in a Court of justice on a particular state of facts, or a particular contract; there is no difference between a right derived from the Crown, and a right arising out of a contract with a fellow subject. [*Parke, B.*—Could not a claim for toll thorough and toll traverse be joined, the same sum being claimed in both counts? or market toll and stallage?] There, the count would be general for tolls. [*Parke, B.*—But, the same difficulty would occur in a plea.] In tort, several counts, or different statements of the same duty, are not allowed; although, in truth, when variously stated, they would be different duties.

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LORD ABINGER, C. B.—I own, if I thought the Judge at chambers had a discretion, or that the rules gave us a discretion, I should be disposed to allow both counts in this case. But, after a good deal of consideration, I think the rules are peremptory upon us, and compel us to make this rule absolute. This is the same thing claimed on different contracts; the same sum proved by the same evidence. I think, therefore, Mr. Crowder has brought his case

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within the terms of the rule, and that this rule must be made absolute.

PARKE, B.—I also am of opinion, that this case is brought within the terms of the rule. In all the cases given as examples, the claims are on different contracts, and for different sums. But when you come to analyse this case, it resolves itself into two different modes of stating the consideration for the same grant of the Crown. In substance, it is a statement of the same grant in different ways; different statements, that is, of the same subject-matter of complaint. Whether an amendment might be made or not is another question; under the circumstances, I should certainly be disposed to allow the amendment.

The rule was made absolute to strike out one count of the declaration, with costs of striking it out, unless the Judge at chambers, on a reference back to him, should exercise the discretion given by the rule, of allowing both counts, on the undertaking of the plaintiff to give evidence of substantially different claims.

Rule accordingly.

JAMES and Others, Assignees of ARTHUR EMERSON, a Bankrupt, v. GRIFFIN and Another.

Where goods, consigned to *A.* in *London*, and deliverable in the river, were

TROVER for lead, the conversion being laid since the bankruptcy.—*First plea*, that one *John Stagg*, being a

by his direction, he being then insolvent, landed on a wharf at which he had been in the habit of landing goods, *A.* having no premises adjoining the river, but having a warehouse in the city; and the goods were stopped in transitu in the hands of the wharfinger:—*Held*, in an action of trover for the goods by the assignees of *A.* (who became bankrupt a few days afterwards,) against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers received the goods as *A.*'s agents to take possession of them for his own benefit as owner, or as agents only to forward them to him, or to keep them for the seller.

Held, also, that directions given by *A.* to an agent whom he sent to order the landing of the goods, in which he expressed his intention not to receive them as owner, were admissible in evidence, although they were not communicated to the wharfingers or to the seller.

trader carrying on business at *Stockton-upon-Tees*, in the county of *Durham*, heretofore, and before the said *A. Emerson* became bankrupt, to wit, on the 1st of *December*, 1834, bargained for and agreed to sell to the said *A. Emerson*, he being then a trader residing and carrying on business in *London*, the said goods and chattels in the said declaration mentioned, at and for a certain price then agreed upon by and between the said *John Stagg* and the said *A. Emerson* in that behalf, and which said goods and chattels were, according to and in pursuance of the said bargain, to be sent by the said *John Stagg* from *Stockton-upon-Tees* aforesaid, and carried and conveyed and delivered to the said *A. Emerson*, at *London* aforesaid; and that the said *John Stagg* afterwards, to wit, on the day and year aforesaid, sent the said goods and chattels by a common carrier from *Stockton-upon-Tees* aforesaid, to be so carried and conveyed and delivered as aforesaid, and which said goods and chattels afterwards, and at the time of the stoppage hereinafter mentioned, were in possession of the defendants, they being wharfingers, in the course of carriage and conveyance: That before the arrival of the said goods and chattels in *London*, the said *A. Emerson* became wholly insolvent, and unable to pay the said *John Stagg* for the same: whereupon the said *John Stagg*, while the said goods and chattels were in the possession of the defendants as aforesaid, and before the delivery thereof to the said *A. Emerson*, stopped the said goods and chattels, and requested the defendants to hold possession thereof for him the said *John Stagg*; whereof the said *A. Emerson* before he became bankrupt, and the plaintiffs as assignees as aforesaid, afterwards had notice: That the price of the said goods and chattels is still wholly unpaid to the said *John Stagg*: wherefore the defendants, after the plaintiffs were so appointed assignees as aforesaid, by direction and under the authority of the said *John Stagg*, refused to deliver the said goods and chattels to

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the said plaintiffs, but delivered possession thereof to certain persons, to wit, Messrs. *Pilcher & Co.*, for the said *John Stagg*, as they lawfully might for the cause aforesaid; and which is the conversion in the declaration mentioned. Verification.—*Second plea*, that the plaintiffs were not possessed of the property as assignees; on which issue was joined.

Replication to the first plea, that after the said goods and chattels in the declaration mentioned had been and were sent by such common carrier as aforesaid, to be carried and conveyed and delivered as aforesaid, to wit, on the 11th of *December*, 1834, the said goods and chattels came into the possession of and were received by the said defendants *as agents* and wharfingers of and for the said *A. Emerson*, and the defendants then held the same as such agents and wharfingers of and for the said *A. Emerson*, and for his use and benefit, and the delivery thereof to the said *A. Emerson* then was complete: and the plaintiffs further say, that the said *John Stagg* did not stop the said goods and chattels, or any or either of them, or any part thereof, or require the said defendants or either of them to hold possession thereof for the said *John Stagg*, at any time before the said defendants received and held such goods as such agents and wharfingers of and for the said *A. Emerson* as aforesaid, or before the delivery thereof to him was complete as aforesaid. On this replication issue was joined.

At the trial before Lord *Abinger*, C. B., at the *London* Sittings after *Trinity* Term, the following facts appeared in evidence—

In *November*, 1834, Mr. *Stagg*, a wholesale lead merchant at *Stockton*, shipped on board of two vessels, called the *Fanny* and the *Cumberland*, a large quantity of sheet lead, consigned to *Emerson*, the bankrupt, who carried on business as a lead and tin merchant in *Lawrence Pountney Lane*, *London*, and had there a counting-house and ware-

house. The lead was deliverable to the plaintiff at *London, in the river*. The vessels arrived in the port of *London* on the 7th of *December*. On the 8th, the captains called at *Emerson's* counting-house, and there saw his son, he not being within: and were very urgent to have the lead taken out and landed immediately. The son communicated the message to his father, and by his direction went on the 10th to the captains on board the two vessels, and directed them to land the lead on *Beale's* wharf, which was a wharf belonging to the defendants, Messrs. *Griffin & Hillhouse*, and nearly opposite to which the vessels were lying. *Emerson* had before been in the habit of landing goods consigned to him at *Beale's* wharf, under written orders from him, and having them forwarded thence to his warehouse. From the vessels, *Emerson* the son went to the wharf, and saw there the defendant *Hillhouse*, and told him that the lead was coming from the *Fanny* and *Cumberland*, and that he was to land it. *Hillhouse* inquired whether it was to be carried away: *Emerson* answered that he did not know whether they would take it away or not. *Hillhouse* asked whether he had not better pile it away; and the other assented. *Emerson*, the bankrupt, being examined for the defendants, stated that at the time of the arrival of the lead he was in embarrassed circumstances; that on his son's informing him of the application made by the captains of the vessels, he directed his son to tell them to land it at *Beale's* wharf, and to desire the defendants to receive it: that this order was given for the accommodation of the captains. The son stated also, that his father, when giving him the directions to go to the wharf, told him he did not intend to take the goods; but this was not communicated to the defendants. On the same day, the 10th of *December*, the goods were lightered from the two vessels into a barge of the defendants, landed at *Beale's* wharf, and piled up there. The captain of the *Fanny*, being very anxious to discharge the lead in order to

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get at other goods at the bottom of the vessel, agreed to pay the lighterage of his lead: *Emerson* was to pay the lighterage of that from the *Cumberland*. The *Fanny* had been in the habit of landing at *Beale's* wharf. On the 18th of *December*, the defendants received a letter from *Stagg* directing them to stop the lead, *Emerson* having refused to accept a bill drawn for the price. On the 22nd a fiat in bankruptcy issued against *Emerson*, under which the plaintiffs were duly appointed assignees. The freight and wharfage of the goods still remained unpaid.

On this evidence the Lord Chief Baron directed the jury, that the question for them was, whether the defendants, as wharfingers, received the goods in question as the agents of *Emerson* or not: if they did, it followed in law that they were in *Emerson's* possession, and the verdict ought to be for the plaintiffs; if the defendants did not receive them as *Emerson's* agents, or received them in an ambiguous and doubtful character, then the ownership of the goods was not in the plaintiffs. He stated also, that, in his opinion, *Emerson's* intention in leaving the goods at the wharf was not of any consequence, not having been communicated to the defendants. The jury found a verdict for the plaintiffs, damages 350*l.* 13*s.* 8*d.*

In the following term, Sir *W. Follett* obtained a rule *nisi* for a new trial, on the grounds—*first*, that the *transitus* was not determined by the delivery to the defendants; *secondly*, that the contract of sale was rescinded before the bankruptcy, the bankrupt having declared that he never intended to take the goods as a vendee.

Sir *F. Pollock*, *Kelly*, and *Hoggins* shewed cause.—The only real question in the case is, whether or not the goods were received by the defendants as the agents and on behalf of the bankrupt: if they were, the *transitus* was

thereby determined. [*Parke, B.*—That is not exactly the question; it is, whether the goods were received by the defendants as agents *to forward* them, or whether they had arrived at their ultimate place of destination.] It may be admitted, that if, on the 8th of *December*, the bankrupt, meaning not to receive the goods, had sent a message of repudiation of the contract, instead of a direction to land them, the assignees would have acquired no title to them. But here there is merely a direction to land the goods, without any intimation that they are to be received, not on his account, but on that of the vendor. The *transitus* is at an end as soon as the power to deal with the goods is for the first time completely vested in the consignee. Could not the bankrupt have sold these goods as soon as they were landed? Even if there is a further *transitus* by the express direction of the vendee, the vendor cannot stop the goods during that *transitus*. [*Parke, B.*—The question really is, whether the defendants received the goods as agents to *receive* as warehousekeepers for the consignee, or as agents to *forward*. Warehousemen stand in one of those two characters: it makes no difference that the agent to forward is named by the consignee.] The goods were deliverable *in the river*. If the transit was not determined by the delivery to the bankrupt in the river, why should the captains of the vessels apply to him for instructions where to land them? That could only be because their business with the goods, as carriers, was at an end. If the transit had not been determined, it would have been the captains' duty to land and forward the goods without any communication with *Emerson*. It was no part of the contract that the shipper should have any thing to do with the goods after they had become deliverable in the river: the bankrupt might have gone and received them there. [*Parke, B.*—So he might in the course of carriage.] That would have been in contravention of the contract; the former

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would be in pursuance of it. The defendants, when they receive the goods, do not propose to forward them, but ask the bankrupt how they are to dispose of them *there*. They pile them there as his agents and servants. These would have been goods in the order and disposition of the bankrupt. [*Parke, B.*—No doubt of that, because the *property* passed to him as soon as they were shipped at *Stockton*.] The bankrupt's having a warehouse of his own does not preclude him from making a public wharf his warehouse also, and a receipt there his receipt. *Ellis v. Hunt* (a), *Rowe v. Pickford* (b), *Dixon v. Baldwin* (c), are authorities in favour of the plaintiffs on this part of the case.

Then, the bankrupt's intention not to keep the goods, not having been communicated to the other parties, cannot change the character of his acts. There is no case in which the *unexpressed* intention of the vendee not to receive the goods, has been allowed any operation whatever. [*Lord Abinger, C. B.*—There are but two cases, as I remember, where the intentions of the insolvent vendee has been inquired into; but in both of them it was expressed by letter. The first was *Atkin v. Barnick* (d), where the intention was stated in a letter to the vendors, the goods being then in the hands of a warehouseman, to whom the vendees had caused them to be delivered for the use of the vendors. The other case was that of *Mills v. Ball* (e), in which also the intention was expressed in a letter to the vendors. And I think there is no doubt here, that if *Emerson* had expressed his intention to the wharfinger, or written to the vendor, that would have been conclusive. *Parke, B.*—Suppose the same intention were manifested by *facts*, not communicated to the wharfinger, what

(a) 3 T. R. 463.

(b) 1 B. Moore, 526.

(c) 5 East, 173.

(d) 1 Stra 165.

(e) 2 Bos. & P. 457.

then?] The goods would still pass to the assignees. If an agent gives goods a new direction by the order of his principal, that makes his possession the possession of the principal, and brings them within the order and disposition of the latter, so as to pass to his assignees if he becomes bankrupt. *Hawkes v. Dunn* (a). The intention ought to be expressed at the time, in such a manner as to be matter of notoriety to all those with whom the party is dealing. It will be very dangerous to admit the bankrupt's own evidence of his own uncommunicated intention, to affect the rights of third parties. [*Parke, B.*—The case is exactly the same in principle as if the intention were proved by other independent circumstances, instead of the bankrupt's oath. The danger of admitting his oath to prove it, seems to me to be merely matter of observation to the jury.]

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But the issues on this record do not raise any question of intention. The only question on the first issue is, whether the goods were in the course of transit or not: if the transit was at an end, the plea is not supported. And, to bring the question within the second plea, a delivery to the bankrupt or his agent, so as to vest the goods in the bankrupt and in his assignees, must be assumed; and it must then be contended that such intention re-vested the property in the vendor.

Sir *W. Follett* and *Alexander*, (*Martin* was with them), in support of the rule.—The *transitus* was at an end by the delivery to the defendants. The bankrupt having no premises on the banks of the river, though he has a warehouse in *London*, the goods are necessarily landed at a public wharf, and from thence conveyed to his warehouse. His designating the wharf at which they are to be landed makes no difference; nor would it if he had sent down

(a) 1 C. & J. 519.

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the same order to *Stockton* originally. If, indeed, he had sent his own lighter, or his own cart, and taken possession of the goods in the river, that would have determined the *transitus*. But it is very different, when they are landed through the medium of third parties, who are to convey the goods to the place of their ultimate destination. The question is not whether the *property* was in the bankrupt—no doubt it was: but whether the goods had been received into his possession. All carriers and wharfingers, in whose hands goods have ever been stopped *in transitu*, are in some respects agents of the consignee to receive the goods: the question is, for what purpose they receive them—whether to keep or to forward. That question was not left to the jury. It is said the goods are deliverable in the river. But the *vendor* does not contract to deliver anywhere in particular; the delivery in the river is a contract between the owner of the vessel and the vendee.

But the declaration of the bankrupt puts the case beyond doubt. The statement, that he would not receive the goods, was made at the same time, and to the same agent, as the direction to have them landed at the defendants' wharf. That direction shews *quo intuitu* they were received into the defendants' possession—not to complete the delivery, but to enable the vendor to stop them. The agent himself states, also, that he gave the order, not to reduce the goods into possession, but to accommodate the captains. These declarations shew clearly, that the wharfingers were *not* in this case agents to receive as warehousekeepers for the vendee. Then, why need the intention be communicated to the wharfinger? He is ordinarily only an agent to forward; why should he be told in this particular case that he is no more?

LORD ABINGER, C. B.—I think the rule must be made absolute for a new trial. The question is, whether what

was done by the bankrupt was a taking possession of the goods by himself or his agent. The rest of the Court incline to think that the directions given by him were admissible to shew the nature of his acts. However, they were in fact received, and went to the jury, and the defendants had the benefit of them; so that on that point only there would be no ground for a new trial. But the question remains, whether the receiving of the goods, with the intention which the bankrupt expressed at that time, was a taking possession of them as his own. I can conceive a case in which the receiving them into his own warehouse would not be a receiving into his own possession: as where, knowing his bankruptcy to be inevitable, he puts them apart from his other goods for the purpose of restoring them to the vendor. Here the bankrupt had great reluctance to receive the goods at all, and received them at last only under the pressure of the inconvenience complained of by the captains. They are then received, under his directions, by the wharfingers: at the same time he tells his son he will not have them himself. He takes possession only for the benefit of the vendor. The question, therefore, which ought to have been left to the jury, is, whether the possession taken of the goods by the defendants, was for the benefit of the bankrupt *as owner*: whereas the only question I left was, whether the defendants took possession of them *as his agents*. I ought to have qualified it further—whether, supposing them his agents, they received the goods as his agents to take possession for his own benefit, or only to keep them for the seller.

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PARKE, B.—The question for the jury was, whether the act of the son was a taking possession by the bankrupt *eo animo* as owner. If it was, the *transitus* was at an end; if not, and he merely meant to take possession for a limited purpose, for the benefit of the seller, the *trans-*

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itus was not at an end. There is certainly every reason here to believe that the latter was the case, because his instructions to the son appear to give an authority to take possession for the latter limited purpose only.

ALDERSON, B.—To defeat the right of stoppage *in transitu*, one of two things must appear: either the goods must arrive at the natural end of their journey, in which case I should rather think the intention of the vendee had nothing to do with the question; or, if the *transitus* is to be put an end to by something *intermediate*, then it is material to consider what that was, and with what intention it was done. Here it is the latter of these cases: it is the intermediate act of the bankrupt's agent, his son, which is to be inquired into. It seems to me that the instructions of the bankrupt to his son were material to be given in evidence, to shew what was the authority to take possession of the goods—whether it was given with the intention of taking possession as owner or not.

Rule absolute.

PARKER v. DUBOIS.

Notice being given to the plaintiff of a call on certain mining shares which he had transferred to the defendant, his attorney wrote to the defendant's attorney to inquire whether

ASSUMPSIT for money paid, and on an account stated.—Plea, the general issue.—The action was brought to recover the sum of 20*l.*, alleged to have been paid by the plaintiff for the defendant and at his request, in discharge of a call of 1*l.* *per share* of twenty shares in the *Cata Branka Brazilian Mining Company*, which the defendant had purchased from the plaintiff. At the trial before Lord Abinger, C. B., at the *London* Sittings after *Michaelmas* Term, the plaintiff gave in evidence the follow-

the defendant was desirous of avoiding a forfeiture of the shares, by authorizing the plaintiff to pay the amount of the call. The defendant's attorney wrote in reply, authorizing the plaintiff to pay the call:—*Held*, that these letters were not a contract, or evidence of a contract, and did not require a stamp.

ing letters. The first was from Mr. *Hudson*, the plaintiff's attorney, to Mr. *Pasmore*, the defendant's then attorney.

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“ *Parker v. Dubois.*

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“ Sir, “ 4, *Old Jewry*, February 27, 1835.

“ I beg to acquaint you, that notice has been given to my client of a call of 1*l.* per share having been resolved on by the directors of the *Brazilian Company*; and I have to request the favour of your informing me, whether the defendant is desirous of avoiding a forfeiture of the shares agreed to be purchased by him, by authorizing my client to pay the amount required. I am, &c.

“ — *Pasmore*, Esq. “ *Thomas B. Hudson.*”

The following answer was returned:—

“ *Parker v. Dubois.*

“ Sir, “ *Basinghall Street*, 28th February, 1835.

“ As it is the intention of my client to redeem the *Cata Branca* shares, your client is hereby authorized to pay the call of 1*l.* per share. I am, &c.

“ *T. B. Hudson*, Esq. “ *James Pasmore.*”

Erle, for the defendant, objected that these letters, taken together, amounted to an agreement, and required a stamp as such. The Lord Chief Baron overruled the argument, and the plaintiff had a verdict.

Erle now moved for a new trial, and renewed the same objection.—These letters amounted to a contract, or, at all events, to evidence of a contract between the parties, that the plaintiff should pay the money for the defendant. In *Smith v. Cator* (a), a letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods then in the factor's possession should remain unsold when the bills fell due, was held to

(a) 3 B. & Ald. 778.

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require a stamp as an agreement. In *Bowen v. Fox (a)*, a letter, inclosing the register of a vessel, which the writer thereby lodged in the hands of the party to whom he wrote, as a security for charges on account of the vessel, was held, in an action by the writer to recover possession of the register, not to be admissible without an agreement stamp. This is not like the case of a mere proposal, not acted on by the other party. Nothing was to be done but the payment of the 20*l.*, in order to support the action.

LORD ABINGER, C. B.—I am of opinion that there ought to be no rule. A contract may be either by parol, or it may be an implication of law arising out of a certain fact, or it may be in writing. In the last case, it must be stamped. This was a mere direction to pay, out of which the law implies a contract. The letters contain no contract, nor are they evidence of a contract, but only evidence of the fact out of which the contract results, namely, the direction to pay.

PARKE, B.—This was no agreement, but a mere direction.

Rule refused.

(a) 2 Man. & R. 167.

WAINWRIGHT, Executor of ABERCROMBY, deceased, v.
BLAND and Others.

A suppression
or false repre-
sentation of
facts, material
to be known by

ASSUMPSIT against the defendants, three of the directors of the *Imperial Life Insurance Company*, on a

the insurers, vitiates a policy of insurance, although it was in answer to a *parol* inquiry, and the policy is, by the articles of the insurance office, to be void on false answers being given to certain *written* inquiries.

Therefore, where a party, going to insure her life for two years, gave false answers to verbal inquiries whether she had effected similar insurances at other offices:—*Held*, that the policy was thereby avoided.

Quære, whether a party may insure his life for the benefit of another, who provides the funds to pay the premiums, and intends to take the benefit of the policy.

policy of insurance for 3000*l.*, dated 22nd *October*, 1830, for insuring the life of the deceased, Miss *Helen Frances Phæbe Abercromby*, for the period of two years from that date. The declaration averred the death of Miss *Abercromby* on the 21st of *December*, 1830, and the plaintiff's appointment as her sole executor, by her will dated the 13th of the same month. Plea, the general issue.

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At the trial before Lord *Abinger*, C. B., at the *Middlesex* Sitzings after *Michaelmas* Term, it clearly appeared that the policy was effected by the deceased, by the persuasion and for the benefit of Mr. *Wainwright*, the plaintiff, and his wife, who was the deceased's half-sister; that the premiums were paid by the plaintiff; that on the deceased's first attendance at the company's office, on the 14th *October*, 1830, in company with Mrs. *Wainwright*, she represented that the insurance was intended to secure a sum of money to her sister, which she should be able to do if she outlived the term of two years; and that, on being asked by the actuary whether she had effected insurances with any other office, she answered, "I wish to insure 5000*l.*, but as your office only takes 3000*l.*, I shall propose 2000*l.* to some other office." The defendants having subsequently ascertained that she had effected a policy for 5000*l.* with another office, and had made a proposal to a third which had been declined, on her attending again at the *Imperial Office*, on the 22nd *October*, the actuary informed her that the directors were much displeased at her not answering his former question in a straightforward way. She said, "I know very little of the business myself; I do as my friends direct me." It was proved that she had, previously to this time, effected insurances with various offices, all of them for a period of two years only, to the amount, in the whole, of 11,000*l.* Miss *Abercromby* died suddenly on the 21st *December* 1830, having by her will, dated the 13th, bequeathed the

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benefit of her policies to her sister, and appointed the plaintiff her sole executor. It appeared that she had executed two wills, both of which were in the possession of the plaintiff, who was proved to have stated, (shewing them to the witness,) a short time after Miss *Abercromby's* death, that they were made "in order that if the one failed, the other might do for him." The plaintiff, as her executor, swore her personal property not to exceed 100%.; and it was proved that she was in fact in indigent circumstances, and without the means of paying the premiums. In the printed list of questions required by the articles of the *Imperial Office* to be answered by the assured, no question was stated as to insurances effected by the party with other offices. The Lord Chief Baron left it to the jury to say, *first*, whether the insurance was effected by the deceased *bonâ fide* for her own benefit, or as the agent of *Wainwright*; *secondly*, whether the false representations made by Miss *Abercromby* to the defendants related to a matter material to be known by them as insurers. The jury found that she effected the insurance as the plaintiff's agent, and for his benefit, and that the false representations were on material points; and a verdict was thereupon entered for the defendants.

Erle now moved for a rule *nisi* for a new trial.—Assuming that the policy was effected for the benefit of the plaintiff, still, as Miss *Abercromby* was of full age, and could be no party to a scheme of securing the payment of the money within the two years, the plaintiff's intention to obtain the benefit of the policy could not operate to relieve the defendants from their contract with the deceased, in whose right the plaintiff now sues as her executor. Even his expectation of her speedy death, supposing it to have existed, was no answer to an action on the policy by the party lawfully entitled to the benefit of it. The question, whether *she knew* that the plaintiff in-

tended all this, was not left to the jury. [*Parke, B.*—She might not know the whole; but she must have known she had not funds to pay the premiums, and that she intended *Wainwright* to have the benefit of the insurances, if they became payable.] But where she herself, by her representative, claims the benefit of the policy, the defendants cannot set up that there was an intention that a third party should have the benefit of it. [*Parke, B.*—Your argument is, that any person may lawfully insure his life for the benefit of another, whatever be the intention of that other party, and from whomsoever the funds are to come.] That is the argument: if she has the legal interest, that satisfies the statute. [*Lord Abinger, C. B.*—Independently of this point, the jury found that she made a false representation that it was for her sister, and also as to her applications to other offices.] It is questionable whether the defendants are at liberty to rely on representations made in answer to parol inquiries, when their articles contain stipulations only as to *written* inquiries and the answers to them. The policy is framed so as to be void only on a false representation in writing. [*Gurney, B.*—There may be many questions material to be asked, preparatory to the written contract.] The questions did not bear on the probability of the life enduring for two years.

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LORD ABINGER, C. B.—There may perhaps be some doubt on the first point; but it is clear the policy was avoided by the false representations. There can therefore be no rule.

PARKE, B.—From the nature of the contract, a suppression of any material fact, or a false answer to any material question, must avoid the policy; *Lindenau v. Desborough* (a). On the other point there may be

(a) 3 C. & P. 350; 8 B. & C. 586; 3 Man. & Ry. 45, S. C.

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GURNEY, B., concurred.

Rule refused.

PENPRASE v. CREASE.

The Court will not compel a plaintiff, suing for the balance of an account, to furnish a statement of monies received by him from the defendant.

THIS was an action against the defendant, the lessee of tin tolls under the duchy of *Cornwall*, for work and labour, and money paid by the plaintiff, who had been the *toller* for eight years.

Butt moved for a rule calling upon the plaintiff to furnish an account of the sums received by him during that time from the defendant or his agent. The defendant wished to obtain the credit side of the account, in order that he might pay the balance into Court. The plaintiff had furnished particulars, but they did not give credit for any sums received.

PARKE, B.—We cannot compel the plaintiff to do more than give particulars of his demand; we cannot make him give evidence against himself. You are not to have a bill of discovery in the shape of an order for particulars. The practice is perfectly established.

ALDERSON, B.—What you seek is just a bill of discovery, without the guards which a Court of equity imposes on such a bill.

Rule refused.

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STRIDE v. HILL and Others.

BUSBY shewed cause (*January 19*) against a rule for staying proceedings on the bail-bond in this cause on payment of costs; and objected, in the first place, that the affidavit on which the rule was obtained was improperly intitled. The title was “ — *Stride*, assignee of the Duke of *Wellington*, Constable of *Dover Castle*, v. — *Hill*,” and two other defendants named. The principal and the bail were all sued together; the rule was obtained on behalf of the bail. He submitted that in such case the affidavit ought to have been intitled in the original cause, there being no complaint of irregularity in the action on the bail-bond. [*Parke, B.*—Where the rule is not moved for irregularity, the affidavit may be intitled in either action; if for irregularity, it must be intitled in the action on the bail-bond.] Another objection is, that the effect of making this rule absolute will be to stay the proceedings against *all* the defendants, the principal as well as the bail, though the application is only on the part of the bail. But the Court has no power to restrain the plaintiff from going on against the principal, because he is not before the Court.

PARKE, B.—We must relieve the bail, and, incidentally to doing so, must relieve the principal in the action on the bail-bond. The consequence is, you cannot go on except against the defendant in the original action.

Busby then argued that the bail-bond ought to stand as a security, the plaintiff having lost a trial. The defendant in the original action was arrested on the 21st of *December*, within the jurisdiction of the *Cinque Ports*; the time for putting in bail expired on the

Where the principal and bail are sued together on the bail-bond, and the bail apply for a rule to stay proceedings on payment of costs, (no irregularity being imputed), the affidavits in support of the rule may be intitled either in the original action, or in the action on the bail-bond.

On such an application, the Court has authority to stay the proceedings as against all the defendants.

The bail-bond cannot stand as a security, unless there has been the loss of an *intermediate* trial, before the application was made to stay the proceedings.

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28th; no bail being put in or notice given within that time, the plaintiff declared on the 29th, laying the *venue* in *London*; on the 30th, he took an assignment of the bail-bond, and issued process in the present cause against the defendant and the bail jointly. On the same day the defendant filed his bail-piece, and gave notice to justify at chambers on the 2nd of *January*. On that day the agents on both sides attended at chambers, when the bail were rejected. On the 3rd, the defendant *Hill* rendered to the bodar of *Dover Castle*; and on the 6th, the plaintiff's agent had notice of that render. On the 7th, an application was made to *Bolland, B.*, at chambers, to stay proceedings on the bail-bond, which was refused, the learned Judge doubting whether the render to the gaol of the *Cinque Ports* was a good render within the statute of 1 *Will. 4*, c. 70, s. 21 (a). On the 8th, the plaintiff declared on the bail-bond; on the 11th, the defendant *Hill* was moved by *habeas corpus* into this Court; and on the same day the present rule was obtained, drawn up to shew cause on the 16th, which was the first day of the term sittings in *London*, the second sitting being on the 29th. *Busby* contended that the plaintiff might have gone to trial in the original action on the 29th; he had therefore lost a trial.

PARKE, B.—At all events, you had not lost a trial on the 11th; and the Master says there must be the loss of an *intermediate* trial before the time of making the appli-

(a) Which authorizes a render to the prison of the Court out of which the process issued, or to the *common gaol of the county* in which the defendant was arrested. *Bolland, B.* stated, that he had consulted several of the Judges

on the point, and they also doubted whether this was such a gaol as fell within the words of the statute. The Court, however, declined to express any opinion on this point.

cation to stay proceedings, in order to entitle the plaintiff to have the bail-bond stand as a security.

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Rule absolute on payment of costs.

A doubt afterwards arose what costs were to be paid by the defendants, and whether the costs of the justification were to be included.

PARKE, B.—The costs, on payment of which the rule is absolute, are the costs of the assignment of the bail-bond, of the action on the bond, and of this application; the costs of justification will be costs in the cause.

DAY v. DAY.

E. v. WILLIAMS moved for judgment as in case of a nonsuit. Issue was joined on the 14th *January* 1835, and notice of trial given for the 12th *February*, before the under-sheriff of *Worcestershire*. On that day the cause was tried accordingly, and the plaintiff had a verdict. A rule was afterwards obtained for a new trial, which was made absolute on the 12th *May*. The plaintiff had not since given any notice of trial. *Williams* admitted that after a trial of the cause at *Nisi Prius*, judgment as in case of a nonsuit could not be obtained (a); but there was no case applying the same rule to trials before the sheriff.

Judgment as in case of a nonsuit cannot be obtained in a cause which has been once tried, though the trial was before the sheriff.

The defendant should move to discharge the writ of trial, and then take the cause down by proviso.

PARKE, B.—I see no reason why a different rule should prevail.

(a) *King v. Pippett*, 1 T. R. 492; *Porzelius v. Maddocks*, 1 H. Bl.
Doe v. Wynne, 1 Chit. Rep. 310; 101.

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ALDERSON, B.—You can move to discharge the writ of trial, and then you can take the cause down by proviso.

Rule refused.

RICHMOND v. BOWDITCH.

A rule was granted, directing the payment of a sum of money by the attorney in a cause, to be absolute unless the attorney shewed cause at chambers by a given day. The attorney made several appointments for attendance at chambers, which he broke, and did not appear within the time limited. The Court, nevertheless, refused to grant a rule for an attachment absolute in the first instance.

CRIPPS moved for an attachment against an attorney for nonpayment of money pursuant to a rule of Court. It appeared that the rule calling on the attorney to pay the money was referred by the Court to a Judge, and was to be absolute, unless the attorney shewed cause at chambers on or before the 7th *December*. Several appointments had been made with him for his attendance at chambers to shew cause, all of which he had broken. Under these circumstances, the rule was prayed absolute in the first instance, on the authority of *King v. Price (a)*.

PARKE, B.—That was a rule of the Court made absolute by the Court; this is a rule referred by the Court to a Judge, and which became absolute by the single authority of the Judge. The case referred to is a solitary exception to the general rule, never to grant a rule absolute in the first instance for an attachment, except for nonpayment of costs pursuant to the Master's allocatur; and as it is distinguishable from the present in the circumstance I have referred to, the Court think we ought not to extend it further.

Rule *nisi* granted.

(a) 1 Price. 341.

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WOODCOCK v. KILBY.

JOHN JERVIS moved for a rule to set aside the declaration for irregularity. A *capias* had issued against two defendants, and the affidavit of debt was sworn against both, but the plaintiff had declared against one only. Immediately on the delivery of the declaration, on the 14th *December*, notice was given to the plaintiff's attorney of the irregularity, and a summons to set aside the declaration was taken out at chambers, but dismissed, the learned Judge, *Gurney*, B., holding the proceedings regular, on the authority of *Caldwell v. Blake* (a), as cited from *Dowling's Practice Cases*, and refusing to allow the defendant time to apply to the Court in term. Upon dismissing the summons, the learned Baron gave the defendant time to plead; and the defendant also afterwards took out a summons for and obtained further time, which had not yet expired. *Jervis* submitted that the declaration was clearly irregular, and that *Caldwell v. Blake* was no authority to the contrary, inasmuch as it appeared from the report in *Crompton, Meeson, and Roscoe*, that it was a case of serviceable and not of bailable process, in which the practice was different; and he contended that the defendant had not waived the irregularity by obtaining time to plead, since he was not bound to allow judgment to be signed and execution to issue, which would only have imposed additional expense upon the plaintiff, the learned Judge being clearly under an erroneous impression, and having expressly refused time to make this application to the Court. A rule having been granted,

If a plaintiff makes an affidavit of debt against two defendants, and issues a *capias* against both, but declares against one only, it is irregular.

Where the defendant, in vacation, took out a summons at chambers, to set aside the declaration for such irregularity, which the Judge dismissed, and refused the defendant time to apply to the Court in term, and the defendant then took out a summons for time to plead:—*Held*, that this was not a waiver of the irregularity.

Bayley shewed cause, and urged that this was no irregularity. [*Bolland*, B., referred to *Carson v. Dowding* (b).] The ground on which the distinction was there put by

(a) 2 Cr. M. & R. 249; 3 Dowl. P. C. 656. (b) 4 Dowl. P. C. 297.

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the Court, that the plaintiff is bound, in the case of bailable process, by his affidavit of debt, appears hardly sufficient to warrant it. [*Parke, B.*—That was the old established practice; the affidavit, writ, and declaration, were all to agree.] At all events, the defendant has waived the irregularity. [*Parke, B.*—He could not come before the first day of term.] He ought to have given the plaintiff notice that he should rely on the irregularity, and not have put him to the expense of attending successive summonses.

Per Curiam.—This was clearly an irregularity, and there is nothing like a waiver.

Rule absolute.

QUIN and Wife v. KING.

A bond conditioned for payment of a sum of money to the obligee, on a day named, according to a proviso contained in a conditional surrender of even date, whereby *A.* (not the obligor in the bond) surrendered to the obligee certain copyhold lands, for securing payment of the same sum,—was held to require only a 1*l.* stamp, although it bore no stamp denoting the payment of the *ad valorem* duty on the surrender, and the latter was not produced.

On *non est factum* pleaded to such bond, where breaches are assigned in the declaration, the jury may assess the damages without a special award of *venire* for that purpose.

DEBT on a bond given by the defendant to the female plaintiff before her marriage, on the 14th *August*, 1813, in the penalty of 5600*l.*, conditioned for the payment to her of the sum of 2800*l.* on the 14th *February* then next, according to a proviso contained in a conditional surrender of even date therewith, whereby one *Thomas King* surrendered to her certain copyhold lands for securing payment of that sum. Breach, nonpayment of the said principal sum and interest. Plea, *non est factum*. At the trial before *Alderson, B.*, at the *London* Sittings in this term, the bond was produced, stamped with a 1*l.* stamp, and the execution was admitted under a Judge's order. It was objected for the defendant—*first*, that, inasmuch as the defendant was no party to the conditional surrender, the bond, as against him, ought, under the 48 *Geo. 3*, c. 149, the

Stamp Act in force at the time of its execution, to have had the full *ad valorem* stamp of 5*l.*; *secondly*, that, at all events, the plaintiff could not shew that it was properly stamped without putting in the surrender, the bond bearing no stamp denoting that the *ad valorem* duty had been paid. The learned Judge overruled the objections, but gave the defendant leave to move to enter a nonsuit; and the jury having found for the plaintiff, it was discovered, when the verdict was about to be entered, that the record contained no award of *venire* to assess the damages, but only to try the issue.

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Bayley now moved for a rule to shew cause why a nonsuit should not be entered, or why the assessment of damages should not be set aside for irregularity.

First, the bond ought to have had a 5*l.* stamp. The provision of the statute reducing the stamp to 1*l.* applies only where the several deeds securing the same sum of money are between the same parties. [*Parke*, B.—The statute does not say so. Is not this a “bond given as a security for the payment of a sum of money, in part secured by a mortgage, or other instrument, charged with the same duty as a mortgage, bearing even date with such bond?” *Alderson*, B.—All collateral securities must be between different parties.] *Wood v. Norton* (a) bears in principle upon this case. There, the same sum was secured by mortgage deed, and by bond, which were executed at the same time, though not bearing even date; the mortgage deed had an *ad valorem* stamp, and the bond a 1*l.* stamp only; and it was held that the latter was not properly stamped; and Lord *Tenterden* says, “All the deeds must be taken to the Stamp Office, and must have a stamp denoting that the *ad valorem* duty has been paid on all the deeds.” [*Alderson*, B.—The ground of the decision there was, that the instruments did not bear even date.]

(a) 4 Man. & R. 673; 9 B. & C. 885.

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Secondly, the plaintiff ought to shew that the *ad valorem* duty has been paid, otherwise he does not shew that 1*l.* is the proper stamp for the bond. [*Parke, B.*—I do not find that the statute requires that as a condition precedent. The recital of the bond is *prima facie* evidence that there was a valid deed of the same date, for the same sum of money. Every condition imposed by the act on the admissibility of the bond with a 1*l.* stamp has been satisfied.]

Thirdly, the jury had no power to assess the damages, the award of *venire* being only *ad triandum*.

On this last point a rule was granted, and

Addison shewed cause in the first instance.—The breach assigned in the declaration involves an assessment of damages. In all cases where there is an issue joined, the jury may assess the damages under the award of *venire* to try the issue, unless in cases where the 8 & 9 *Will. 3*, c. 11, s. 8, renders it necessary to have a special award of *venire* for the purpose. The present objection can only go to the *authority* of the jury. But the breach assigned being admitted by the plea, the amount to be assessed is, in fact, mere matter of arithmetical calculation: it may be doubted, therefore, whether any formal assessment was necessary; but if it was, the authority of the jury is given by the statute, not merely by the award of *venire*. The statute directs that *the jury* shall assess the damages.

But it can hardly be said that this bond, which is to secure money lent, payable on a day certain which is mentioned in the condition, is within the statute at all. For the purposes of this action, it is nothing more than a common money bond. In *Murray v. Earl of Stair* (a), a *post obit* bond, on which a forfeiture had taken place,

(a) 3 D. & R. 278; 2 B. & C. 82.

was held not to be within the statute. The amount to be recovered is the subject of computation merely. [*Parke, B.*—Is not the bond conditioned also for the fulfilment of the covenants, and so within the statute?] No breach is assigned on that part of the condition. [*Parke, B.*—You would be entitled to have the judgment on this bond to stand as a security for the future performance of the covenants. The question is, whether the statute by implication gives the jury who try the issue power to assess the damages. It does, by the first clause of the section, but not by the second; and I think you will find that an issue on *non est factum* falls within the second clause. *Ethersey v. Jackson (a)*]. That was a case where no breach was assigned in the declaration.

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But at all events, the record may be amended; it is in the nature of a misprision. [*Alderson, B.*—The difficulty is, you would be amending after the jury have found their verdict, whereas you want the amendment to enable them to find the verdict.] The omission was discovered before the verdict was formally taken.

Bayley, in reply.—It is true there is a breach admitted, but not such a one as gives the plaintiff a right to the assessment of damages; the defendant only admits that he did not pay on the day limited by the condition. In order to render a writ of inquiry and assessment of damages unnecessary, the plaintiff should have gone on to shew how much was due for principal and interest.

It is conceded that the jury *may* assess the damages, if the *venire* be awarded specially. [*Parke, B.*—The question is, whether the case falls within the first or second branch of the section. It would seem as if the first branch applied to an issue joined on a breach by *nonper-*

(a) 8 T. R. 255. See 1 Saund. 58 b; 2 Saund. 187 b.

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formance, and that, upon an issue on *non est factum*, the plaintiff ought to suggest breaches according to the second clause: here he has not done so, but assigned a breach in the declaration.]

Cur. adv. vult.

On a subsequent day judgment was delivered by

PARKE, B.—In this case one point stood over for consideration. It was suggested that the plaintiff could not proceed to recover damages, without a special award of *venire* to assess the damages, as well as to try the issue. The 8 & 9 *Will.* 3, c. 11, s. 8, provides, that in all actions on bonds, or on any penal sum for nonperformance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff may *assign* as many breaches as he shall think fit, and the jury, upon trial of such action, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken: and that if judgment be given for the plaintiff on demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may *suggest* as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury, &c., to inquire into the truth of every one of those breaches, *and* to assess the damages that the plaintiff shall have sustained thereby. So that there are two classes of cases contemplated by the statute, one in which breaches may be assigned in the declaration, the other in which they may be suggested on the roll: if they are assigned, the jury may assess the damages without a special *venire*, but where they are suggested, there ought to be a special *venire* to enable them. So the point stands without referring to any authorities. But in the case of

Parkins v. Hawkshaw (a), the very point now in question arose before Lord *Tenterden*, who said that he recollected a case on the Western Circuit where it was so contended, and that he also thought, that this form of the record was correct. With that authority, there is no doubt that this rule ought to be refused.

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Rule refused.

(a) 2 Stark. N. P. C. 381.

BULL v. TURNER.

STEER had obtained a rule to shew cause why a sum of 68*l.* 10*s.*, paid into Court in lieu of bail in this cause, should not be taken out by the plaintiff in discharge of the debt and costs, the plaintiff having obtained judgment and taxed his costs.

Where money is paid into Court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him in discharge of the debt and costs.

Mansel shewed cause, on an affidavit which stated that this money was paid in, not by the defendant, but by a *Mrs. Lake*, one of his bail, in her own name, and that the defendant had rendered in discharge of his bail; and contended, that such being the circumstances of the case, the plaintiff was not entitled to take the money out of Court, but it ought to be repaid to *Mrs. Lake*.—The statute 7 & 8 *Geo.* 4, c. 71, s. 1, does not apply to such a case as this, but only where the defendant himself makes his election to pay into Court money in lieu of bail. The bail were entitled to render the defendant, and were thereby exonerated altogether. [*Parke*, B.—How could the money be paid in at all except under the statute?] There is a case in which it was allowed before the statute; *Fowell v. Leo* (a). [*Parke*, B.—There it was paid in to

(a) 1 Taunt 425.

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abide the event of the cause; then if this is paid in to abide the event, the plaintiff is entitled to it.] In *NUMM v. Powell (a)*, it was held, on the stat. 43 Geo. 3, c. 46, that if a deposit be made with the sheriff by any other person than the defendant, the Court will, on the defendant's being rendered, order it to be repaid to the person by whom it was deposited. [*Parke, B.*—That is not this case: here it is paid in in lieu of bail above; in the absence of any special order as to the terms of paying it in, it must be taken to have been paid on the terms of the statute.] The statute contains no allusion to any body but the defendant himself.

PARKE, B.—No doubt, under this statute as well as the former, the money is to be repaid to the party paying it in, in any case where he is entitled to receive it out; but no such case can arise under the statute as that which is suggested; when the money gets into Court, it must stay there till there is judgment for the plaintiff or for the defendant.

The other Barons concurred.

Rule absolute, with costs.

(a) 1 Smith, 13.

BERRINGTON and Another v. PHILLIPS.

In an action on an attorney's bill, the plaintiffs gave notice,

THIS was an action on an attorney's bill, for business done up to the month of *August* 1831. It appeared that pursuant to 3 & 4 Will. 4, c. 42, s. 34, that they should claim interest from the date of the notice. After the writ was issued, the bill was referred to taxation at the instance of the defendant, no terms being made as to the allowance of interest:—*Held*, that the plaintiffs could not afterwards have an assessment of damages for the purpose of recovering the interest.

a signed bill was delivered on the 1st of *November*, 1833; on the 2nd *December*, the plaintiffs made a demand of the amount under the statute, in which also they gave notice that they should claim interest from that date, pursuant to the 3 & 4 *Will.* 4, c. 42, s. 34. The writ of summons was sued out in *June*, 1834. The bill was subsequently referred to taxation, at the instance of the defendant; and the Master having taxed the plaintiff the amount of principal only, an application was made to a Judge to order a taxation of interest from the date of the demand; which was refused, on the ground that the statute only allowed the *jury* to give interest.

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Maule now moved, on behalf of the plaintiffs, for a rule to shew cause why a writ should not issue to the sheriff of *Glamorganshire*, directing him to summon a jury to try whether the plaintiffs were entitled to interest. [*Alderson*, B.—The difficulty is, whether, when you submit the bill for taxation, the matter is not at an end.] The party has a right to have the bill taxed. [*Alderson*, B.—Not after action brought; you should therefore have made it a condition of the taxation, that the defendant should allow the Master to tax interest also.]

PARKE, B.—The common order having been made and acquiesced in, it is too late to alter the terms of it.

Rule refused.

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WEDDALL v. CAPES.

By agreement, dated in *May*, to which *A.*, *B.*, and *C.* were parties, *A.* and *B.* agreed to sell by auction an estate, to which they were entitled as tenants in common, or in default of such sale, that such parts of it as should not be sold after the 1st *August*, and before the 1st *September* following, should be divided into two equal lots between *A.* and *B.*; and that 100*l.* should be paid by *B.* to *C.*, the principal tenant, as a remuneration for his giving up possession of his farm at the *Michaelmas* following; and *C.* agreed to give up possession of his farm accordingly. No part of the estate was sold by the 1st *September*, but some portions were sold subsequently, and the remainder was divided between *A.* and *B.*, but such division was not completed till the following *March*.

C. continued in possession, by the desire of *A.* and *B.*, until that time, and then quitted:—*Held*, that the agreement was not a surrender of *A.*'s term.

ASSUMPSIT to recover the sum of 100*l.*, claimed to be due from the defendant to the plaintiff on the following agreement:—

“Memorandum of agreement made the 23rd day of *May*, 1831, between *Robert Plumer Weddall*, of *Goole*, in the county of *York*, gentleman, of the first part; *Thomas Hawksley Capes*, of *Redness*, in the said county, gentleman, of the second part; and *William Weddall*, of the same place, gentleman, of the third part.

“It is agreed between the said *R. P. Weddall* and *T. H. Capes*, that they will forthwith proceed to sell by auction in lots the whole of the estate in *Redness*, *Whitgift*, and *Swinefleet*, to which they are now entitled as tenants in common, provided their price can be obtained; and that, in default of making sale of the whole, that the said estate, or such part as shall not be sold, shall, after the 1st day of *August*, and before the 1st day of *September* next, be divided by Mr. *William Thornton*, of *Redness* aforesaid, into two equal lots, according to the best of his judgment, as to value and convenience; and that the said *R. P. Weddall*, if he think fit, shall have the choice of such two lots, giving 100*l.* to the said *T. H. Capes*; but if he shall not accept such election, then that he and the said *T. H. Capes* shall draw cuts as to choice, and that each party will convey to the other accordingly, free from incumbrances by him committed. It is further agreed, that upon such sale and partition, the sum of 100*l.* shall be paid by the said *T. H. Capes* to the said *William Weddall*, the principal tenant of the estate, as a remuneration for his losses, upon his giving up possession of his farm next *Michaelmas*, in addition

to what he may be entitled to as off-going tenant, according to the terms of agreement for his farm. And the said *William Weddall* agrees to give up possession of his said farm on *Michaelmas-day* accordingly, which day is understood to be the 11th day of *October* next, reserving to himself the same rights as to his following crop as if this agreement had not been made; but as the said *T. H. Capes* does not know whether the said *William Weddall* be entitled to a following crop, this agreement is not intended to give him that right unless he be so entitled, the said *William Weddall* paying his rent up to *Michaelmas*, as heretofore. Witness the hands of the parties, the day and the year first above written.

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“ *Robert. P. Weddall.*

“ *Thomas H. Capes.*

“ *William Weddall.*

“ Witness, *George H. Capes.*

“ The said Mr. *Weddall* is to be allowed to keep the possession of his barn up to *Candlemas-day*, 1832, and a stable for his horses, which is attached to the barn.

“ *G. H. C.*”

At the trial before *Tindal*, C. J., at the last Summer Assizes for *Yorkshire*, the agreement being produced, stamped with a 1*l.* stamp, it was objected for the defendant, that the instrument amounted to a surrender by *William Weddall*, the plaintiff, of his interest in the land, and ought therefore to have borne a 1*l.* 15*s.* stamp. The learned Chief Justice overruled the objection, and received the agreement in evidence. It appeared that the estate was not sold by the 1st of *September*, but that certain portions of it were subsequently sold, and the remainder was divided and allotted between the defendant and *R. P. Weddall*, pursuant to the agreement; but such allotment was not completed till *March*, 1832, until which time the plaintiff,

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by their desire, continued in possession, and then quitted. A verdict having been found for the plaintiff,

Cresswell, in the following term, obtained a rule *nisi* for a new trial, on the objections taken at *Nisi Prius*, citing *Williams v. Sawyer* (a).

Alexander and *Wightman* (*Hoggins* with them) now shewed cause.—This instrument did not amount to an actual surrender. A surrender must pass a present interest; whereas, by this agreement, several things were to be done, which might or might not be carried into effect, before the plaintiff gave up possession; and in fact they were not carried into effect, the property not being sold as was contemplated, and the division of the part remaining unsold not being completed till half a year after the period at which the plaintiff was by the agreement to give up possession. How could this, therefore, be a surrender at the moment of its execution? The cases in which notices to quit, if assented to by the landlord, have been held to operate as surrenders, do not apply: the notice to quit is not by itself a surrender, but is made so by what is done subsequently; but an objection on the ground of the stamp must be applied to the instrument as it existed at the moment of its execution. *Williams v. Sawyer* is quite different; there, the landlord was to have immediate possession, and the surrender was of an immediate interest; it was not an agreement to surrender at a future time. [*Parke*, B.—No particular words are necessary to make a surrender, if it sufficiently appear to be the intention of both parties that the term should immediately cease; but this is an agreement for it to cease *in futuro*. Besides, it is to give up at *Michaelmas*, if the plaintiff is paid 100*l.*; how can it possibly operate as a surrender until that is paid?] In *Parson's case* (b), where

(a) 3 Brod. & B. 70; 6 Moore, 226.

(b) Dyer, 374, b.

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one by deed granted and covenanted to his lessor and two others, and each of them, that he would surrender his term at *Michaelmas* next ensuing, it was held that it was no surrender. But further, if this is a surrender, who takes by it? It is clearly not a surrender to the defendant or *R. P. Weddall*, because they contemplate a sale of the whole property: nor can it be to the future purchaser, who is not then known. *Vin. Abr. Surrender*, G. 5, shews that the party in whom the estate is to vest must be certain, and must be the person who has the next immediate estate in remainder or reversion. The conditions introduced into the agreement of themselves prevent its operating as a surrender at all events, as they have not been performed. *Copeland v. Maynard* (a). Could the defendant have treated the plaintiff as a trespasser, and maintained ejectment against him, not having paid the 100*l.*? If this was a surrender, he could; but it is submitted that he clearly could not.

Cresswell, in support of the rule.—The agreement to pay the 100*l.* is not a condition precedent, and the plaintiff could not insist on retaining possession if it was not paid. After the 11th of *October*, if he had not gone out, it is submitted that the landlord *might* have brought ejectment. If he might, this is a surrender, since the term could not otherwise be determined; for it is clear it is not a sufficient notice to quit. And although certain events might have happened, which might have made it other than a surrender, yet, if they have not happened, it has its effect. [*Parke*, B.—Is it not a surrender, if at all, on the contemporaneous payment of 100*l.*,—like the delivery of goods on payment? Both the days fixed for the sale and partition are antecedent to the day of giving up possession.] Then the right to the 100*l.* vests before the giving up possession, and they are not contemporaneous,

(a) 12 East, 134.

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and the surrender is not subject to that condition. The estate could determine on the day appointed in no other way but by surrender. [*Parke, B.*—In *Johnstone v. Hudleston* (a), an insufficient notice to quit, accepted by the landlord, was held not to operate as a surrender by operation of law. It was there argued that there could not be a surrender to operate *in futuro*, but the Court gave no opinion on that.] It would appear from the judgment of *Holroyd, J.*, that he thought there might; and it is clear that a surrender may be subject to a condition either subsequent or precedent. *Shep. Touch.* 307. [*Parke, B.*—Supposing that to be ambiguous, how can you tell on the 11th of *May* who is to be the person in whose estate the term will merge on the 11th of *October*?] That would be determined by matter subsequent. [*Parke, B.*—That is contrary to the definition of a surrender, which is “the yielding up of lands, and the estate a man hath therein, unto another *that hath a higher or greater estate* in the same.” (b)] If the time arrives when this document would work a surrender, from that time it is to be taken as a surrender. [*Parke, B.*—But it must be stamped according to what is on the face of it at the time of its execution.] The objection as to the stamp is made to the receipt in evidence of the document at the trial: except for the purpose of being given in evidence, it is as good without a stamp as with it; then as to that objection, the time of giving it in evidence is to be looked at.

PARKE, B.—Whenever the stamp is affixed, it must be affixed according to the manner in which the instrument operated at the time it was executed. The rule must be discharged: I think it is a very plain point.

The rest of the Court concurred.

Rule discharged.

(a) 4 B. & C. 922; 7 D. & R. 411.

(b) *Shep. Touch.* 300; *Co. Litt.* 337. b.

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BADDELEY v. GILMORE.

R. V. RICHARDS had obtained a rule calling upon the plaintiff to shew cause why a commission should not issue for the examination of witnesses at *Sydney*. The action was for a seaman's wages; the defence, mutinous conduct on the part of the plaintiff, which rendered it necessary for the captain to discharge him. The affidavit alleged that the facts stated in the pleas, or a material part of them, took place in the presence of the witnesses named; that they were now settled or resident at *Sydney*, and that their evidence was material and necessary to the defence.

J. J. Williams shewed cause.—There are several objections to this affidavit.—*First*, it does not state that the evidence is admissible. *Secondly*, it does not state that the application is *bond fide*, and not for delay. Both these were held, in *Lloyd v. Key* (a), to be necessary statements. *Thirdly*, there is no affidavit of merits. [Lord Abinger, C. B.—What do you mean by *admissible* evidence?—Do you mean that the witnesses are not competent? The affidavit states that they saw the transactions they are to depose to.]

Richards, contrà.—There is nothing to take the case out of the usual rule. The application was refused in the case referred to, because the Court thought it appeared to be made for delay.

Lord ABINGER, C. B.—I think the affidavit is sufficient. The rule must be absolute.

Where an affidavit in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary:—*Held* sufficient; and that the affidavit need not state that the evidence was *admissible*, or that the application was *bond fide* and not for delay; and also that no affidavit of merits was necessary. And the Court, in granting such an application, will not impose terms upon the party applying.

(a) 3 Dowl. P. C. 253.

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Williams then applied that the wages claimed should be paid into Court, the owner being resident in *London*: the commission would take a period of two years to execute it.

Richards insisted that the application was one of right, not of indulgence, and that no terms ought to be imposed, the Court being of opinion that the defendant had entitled himself to the rule.

The Court refused to make any order.

CHESLYN v. PEARCE.

Countermand of notice of trial, in a country cause, may be given by the country attorney, although the agent in town is the attorney on the record.

BARSTOW shewed cause against a rule for costs of the day for not proceeding to trial.—The question was, whether there was a good notice of countermand. Issue was joined in *Trinity* Term, and notice of trial given for the *Leicester* Assizes, the commission day being the 24th of *July*. The attorney for the plaintiff on the record was Mr. *Cragg*, who was the agent in *London* of the defendant's country attorney, Mr. *Brock*; notice of countermand was given by the latter, in due time. The objection was, that it ought to have been given by the attorney on the record. It appeared by Mr. *Cragg's* affidavit, that he had issued the writ as the plaintiff's agent, and so indorsed it; that a summons for time to plead had also been indorsed with his name, as agent for the plaintiff. It was sworn also that another action had been tried between the same parties at the same assizes, which Mr. *Brock* conducted on behalf of the plaintiff, the same attorney appearing for the defendant as in this action, and making no objection to the notice of counter-

mand. *Barstow* contended that the notice was regular. —The rules of Court adopt the distinction between the attorney on the record, who is the mere agent, and the attorney in the country, who is really the attorney of the party. Thus, rule 6 of *Hilary Term 2 Will. 4*, says, “where an *agent in town*, or an *attorney in the country*, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be allowed.” That rule, therefore, takes notice of the latter as being the attorney for all practical purposes. If it were otherwise, though the attorney and the client might live in the same town, it would be necessary for the attorney to incur the delay of writing up to town, for the purpose of such a mere formality as this. [*Parke, B.*—The 57th rule of *Hilary Term 2 Will. 4*, seems to imply that the notice may be given either by the principal attorney in the country, or by the agent in town; it says, that notice of trial and inquiry shall be given in town, but that countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered.] In *Dennett v. Pass(a)*, it was held, that a demand for costs, ordered to be paid to the defendants or their attorney, might be made by the attorney in the country, though the agent in town was the attorney on the record.

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G. T. White, contra, contended that the description “plaintiff’s attorney,” subscribed to the notice, meant in strictness the attorney on the record. The form given in *Tidd* (Appendix, 270) has a distinct reference to each character; the form of signature being “*A. B., plaintiff’s attorney (or agent).*” No doubt the agent is a competent party to give the notice, but he must give it in his character of agent. When he becomes the attorney on the record, the attorney in the country becomes the

(a) 1 Bingh. N. C. 638; 1 Scott, 586.

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agent. In strict practice, therefore, there is nothing to shew that Mr. *Brock* is the attorney for the plaintiff in this action, though he is his general attorney.

PARKE, B.—I think this notice was sufficient. The defendant, on whom it is served, knows perfectly well what character the party signing it fills. And from the rule which I have referred to, it appears that the countermand may be given by the principal or agent, as the case may be, in the country; or the principal or agent, as the case may be, in town.

The rest of the Court concurred.

Rule discharged, with costs.

KEMP v. HYSLOP and Another.

A plaintiff having recovered a verdict at the Summer Assizes, the Judge who tried the cause, under the power given by 1 *Will.* 4, c. 7, s. 2, made an order that execution should issue forthwith, and a *ca. sa.* was thereupon issued, returnable “immediately after execution thereof,” pursuant to 3 & 4 *Will.* 4, c. 67, s. 2. This writ having remained in the sheriff’s office a considerable time without having been executed, an order was made by a Judge on the 12th of *September*, for the sheriff to return the writ in six days, which order was served upon him on the 14th, and he on the same day returned *non est inventus*, whereupon the plaintiff commenced an action against the defendant’s bail:—*Held*, that under these circumstances the bail were not fixed, and that the action was prematurely commenced.

IN this case *Bompas*, Serjt., on the first day of last *Michaelmas* Term, obtained a rule to shew cause why an order of *Bosanquet*, J., for setting aside the proceedings in an action against the defendants, the bail in an action of *Kemp v. Jones*, should not be rescinded, and the action against the bail be allowed to proceed. It appeared that the original cause of *Kemp v. Jones* was tried before *Tindal*, C. J., at the last Summer Assizes for the county of *Surrey*, when, the plaintiff having recovered a verdict, the learned Judge, pursuant to the power given by 1 *Will.* 4, c. 7,

“immediately after execution thereof,” pursuant to 3 & 4 *Will.* 4, c. 67, s. 2. This writ having remained in the sheriff’s office a considerable time without having been executed, an order was made by a Judge on the 12th of *September*, for the sheriff to return the writ in six days, which order was served upon him on the 14th, and he on the same day returned *non est inventus*, whereupon the plaintiff commenced an action against the defendant’s bail:—*Held*, that under these circumstances the bail were not fixed, and that the action was prematurely commenced.

s. 2, made an order that execution should issue against the defendant forthwith. A writ of *capias ad satisfaciendum* was thereupon issued, returnable "immediately after execution thereof," pursuant to the 3 & 4 Will. 4, c. 67, s. 2. This writ having remained in the sheriff's office for a considerable time without having been executed, an order was made by *Tindal*, C. J., on the 12th of *September* last, for the sheriff to return the writ in six days. This order was served on the sheriff on the 14th, and he on the same day returned *non est inventus*, and thereupon the plaintiff commenced an action against the defendant's bail: and the bail having obtained the above order of *Bosanquet*, J., for setting aside the proceedings in that action, on the ground that it was prematurely commenced, the present rule was obtained for rescinding that order.

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Busby shewed cause.—The question in this case is, whether the *ca. sa.* against the original defendant can be considered as returnable, the writ not having been executed. That depends upon the construction to be put upon the language of the 2nd section of 3 & 4 Will. 4, c. 67, which provides that "all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after *execution* thereof." There is very good reason why this section should apply to the case of an execution upon a *fi. fa.*; because, if only a part of the debt can be levied in one county, the plaintiff may have a second execution into another county for the residue. But the word "execution," as applied to a *ca. sa.*, can have only one meaning—that is, the actual personal caption of the party: and if the party is not taken upon it, then it is not executed, and is not returnable until the next term, for the purpose of fixing the bail. The action against the bail was therefore pre-

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Bompas, Serjt., contra.—The argument on the other side goes to this extent, that this writ cannot be returned at all by virtue of any order, until it is executed. Before the statute in question, all writs of execution were returnable on a day certain in term time. But this being made returnable after execution, it would never be returnable at all until it was executed, unless the Court or a Judge has the power to order the sheriff to return the writ. [Lord *Abinger*, C. B.—It might be a question whether it was not returnable at the first return of the ensuing term.] By the 2 *Will.* 4, c. 39, s. 15, a Judge has the same power in vacation as the Court has in term, to order the return of writs of execution; and the question here is, whether the sheriff, in case he cannot execute a writ of *ca. sa.*, may not, under a Judge's order, return *non est inventus*. [Lord *Abinger*, C. B.—Has the Court the power of ordering a writ to be returned before the time at which it is expressed to be returnable?] Perhaps not, where a definite day is named in the writ: but to say that a Court has no power to order their own writ to be returned when the time for its return is purely indefinite, is another question, and it would be rather singular if it were so. [*Parke*, B.—By the 15th section of the 2 *Will.* 4, c. 39, express power is given to the Court in term time to make rules, or to any Judge of either of the Courts in vacation to make orders, for the return of any of the writs therein named, amongst which is a *ca. sa.* Taking that in conjunction with the 3 & 4 *Will.* 4, c. 67, s. 2, it may perhaps authorize a Judge to order a *ca. sa.* to be returned, although not executed. It may however be said, that the latter act does not confer any such power.] It would have been quite useless for the 3 & 4 *Will.* 4,

c. 67, to have added that a Judge should have power to order writs of execution to be returned, when that power was already given by the former act. A sheriff cannot be brought into contempt, except there be a rule ordering him to return the writ; in this case, therefore, he could not be brought into contempt, unless the Court has the power to order him to return it. If he cannot execute it, he cannot return it, unless the Court have the power to order him to do so, and if they have not that power, they cannot even inquire whether he has executed it or not. [*Parke, B.*—The great difficulty arises from this, that the Legislature have omitted to add to the 3 & 4 *Will.* 4, c. 67, a schedule giving a form of the writ, as was done in the Uniformity of Process Act, directing the writ to be returned within a fixed time from the date, or in the mean time by order of the Court in term time, or of a Judge in vacation.] It is submitted that the 15th section of the 2 *Will.* 4, c. 39, does give a Judge power to order this writ to be returned in vacation. [Lord *Abinger, C. B.*—The question is, whether a Judge has power to order it to be returned before it is expressed to be returnable. A plaintiff may obtain an order for a sheriff to return a writ after it is returnable, but can he do so before it is returnable? *Parke, B.*—You seem to be driven to argue this, that, on a writ so vague as the present, the Court must incidentally have the power to order it to be returned at any time, though not executed. The object of the 15th section was to give the Court in term time, or a Judge in vacation, power to order the return of writs in vacation, where they have been already made returnable in the preceding term. Formerly, if a writ was returnable on the first return day in a term, and no rule to return it had been taken out in the term, the sheriff could not be compelled to return it till the beginning of the following term;

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but now by this provision, the Court in term time, or a Judge in vacation, are enabled to order a writ, of which the return day is already passed, to be returned at any time.] The Court must incidentally have the power to call on the sheriff to answer whether the writ is executed or not, and to make a return thereto. If this return is regular, and it is submitted that it is, then the bail are equally fixed, whether it is made in term or in vacation.

Cur adv. vult.

The judgment of the Court was now delivered by—

Lord ABINGER, C. B.—A rule *nisi* was obtained in the last term, to set aside an order of my Brother *Bosanquet*, by which the proceedings on a recognizance of bail were set aside as irregular, and cause was shewn. The facts were these: judgment having been obtained on a trial at *Nisi Prius*, in the vacation, against the principal, a writ of *capias ad satisfaciendum* was sued out on the 14th of *August*, returnable immediately after the execution thereof, pursuant to the power given by the 3 & 4 *Will. 4*, c. 67, and on the same day was lodged at the sheriff's office, and entered in the public book. On the 12th of *September*, the Lord Chief Justice of the *Common Pleas* made an order on the sheriff to return the writ in six days, which was served on him on the 14th, and he returned the writ on the same day, "*non est inventus*." Proceedings were thereupon had against the bail, who applied at chambers to set them aside; and my Brother *Bosanquet*, after taking time to consider, made an order to that effect, being of opinion that the bail were not regularly fixed. The question is, whether this order was right; and we are of opinion that it was. If no Judge's order had been made to return the writ of *ca. sa.*, there can be no question but that the bail would not have been fixed; for the writ of itself would not have been *returnable*, and until then the bail are not liable; and indeed

it never could have been returnable at all, until the principal had been taken, and then the bail would have been discharged by the act of taking the principal.

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But it is said, that the Judge's order to return the writ has the effect of making it returnable at the time stated in the order; and that time having elapsed, and the writ having been lodged in the office for more than four clear days before that time, the bail are fixed. To this it is answered—*first*, that the Judge had no power to make such an order, and that it is a mere nullity; and, *secondly*, that if he had, still the bail have not had the advantage allowed them by law, and are not fixed.

With respect to the Judge's power to issue the order, it was contended that such power was given, either by the 2 Will. 4, c. 39, s. 15, or, by implication, by the 3 & 4 Will. 4, c. 67, which first makes a *capias ad satisfaciendum* returnable *immediatè*, and which by the title appears to be an act to *amend* the former act; or, lastly, that the order was authorized by the general jurisdiction of the Court over its own process. But, admitting that such an order was legal on one of these three grounds, (and we are disposed to think it was a legal order for the purpose of compelling the sheriff to notify by his return what he had done with the writ), we do not think it can have the effect of altering the time when the writ is returnable; and if it had such effect, we are of opinion that the bail could not be fixed until notice of that order was given to them, or at least until the order was lodged at the sheriff's office with the writ, and an entry made of it in the public book, and that for more than four days at least before the time at which the order made the writ returnable. For if the order has the effect of making the writ returnable at a different time from that at which it was originally returnable, the bail have a right either to be informed when the writ is so made returnable by actual notice, or to have the power

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of ascertaining it, on the usual search in the office, so as to be able to render their principal before the return day of the writ, (at which time it is a matter of right in them to render their principal), and to have four clear days to enable them to do so.

It may indeed be well doubted whether bail *can* be fixed at all, except by process of *ca. sa.* in the old form; and if they could be, it would be productive of much hardship to them. The rule is, that the writ must be in the office four days exclusive, before the return day and the four last days; and the bail, being bound to search the office, could protect themselves by an actual search during term, and for four days before it, under the old process. But if the optional process given by the recent act, with a Judge's order for its return, is sufficient to fix the bail, they cannot be safe without a perpetual search, *de die in diem*, in the sheriff's office, in vacation as well as in term; and it is very questionable whether the power given by the act could have been intended so materially to prejudice the situation of bail. We cannot help thinking that there is great weight in this objection, and it will be well to avoid it in future by issuing the *ca. sa.* in the old form, returnable in term, in those cases where it is intended to proceed against the bail. In the present case, however, we are of opinion that the bail ought to be relieved; because, even supposing it competent for a plaintiff to proceed to fix bail by the new form of writ, and supposing the Judge's order to have the effect of altering the time when the writ was returnable, the bail have never been informed, or had the proper means of informing themselves, of the time when the writ was so made returnable.

The rule must therefore be discharged; and it must be with costs.

Rule discharged.

ISAAC v. FARRAR.

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ASSUMPSIT by the indorsee against the maker of a promissory note for 250*l.*, payable three months after date to the order of the maker, and by him indorsed to one *Henry Richardson*, who indorsed it to the plaintiff.

Plea—That before the making of the said promissory note, to wit, on &c., a certain advertisement had been and was inserted in a certain newspaper, to wit, the *Morning Herald*, to the tenor and effect following, viz.: “Money to lend upon personal security.—Noblemen, clergymen, and persons of responsibility, requiring the temporary advance of money, can be immediately accommodated with loans to any amount, at a very low rate of interest; application to be made, in the first instance, in writing, addressed to Mr. *Anderson, Fludyer Street, Westminster.*” And the defendant averred, that in consequence of the advertisement, he did, to wit, on &c., call at the said place, to wit, &c., and there saw one *Charles Ander-*

Assumpsit by the indorsee against the maker of a promissory note for 250*l.*, payable three months after date to the maker's order, and by him indorsed to one *H. R.*, who indorsed it to the plaintiff. The plea began by stating, that an advertisement had been inserted in a newspaper offering money to be lent upon personal security, on application to Mr. *A.*, 12, *Fludyer Street, Westminster*, and that, in

consequence of that advertisement, the defendant called at that place, and saw *A.*, and in consequence of representations made to him by *A.*, he (the defendant) was induced to and did draw and deliver to *A.* two promissory notes, by each of which the defendant promised to pay to his own order the sum of 250*l.*, three months after the date thereof (one of them being the note in the declaration mentioned), upon the faith of, and promise from *A.*, that the said notes should be renewed when due, for the space of two years, and that he should receive from the said *A.* on a certain day, to wit, the *Friday* then next following, being, to wit, the 1st of *May*, 1835, the amount of the said notes, deducting discount and stamp. And the defendant averred that the said *A.* did not, either on *Friday*, the 1st of *May*, 1835, or at any other time, although often requested, pay to the defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but on the contrary thereof, that he, the said defendant, on the said 1st of *May*, 1835, by appointment of the said *A.*, went to the said place, to wit, 12, *Fludyer Street*, but the said *A.* was not, nor was any such person, either then or at any time afterwards, there to be found; and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was any consideration or value on the said note between any parties thereto. The plea then went on to aver that *H. R.* and the plaintiff, at the respective times when the note was so indorsed to them respectively, were privy to, and had full knowledge and notice of, the said transaction in the plea detailed, and of the said fraud and imposition; concluding with a verification.—To this plea the plaintiff replied, *de injuria*:—*Held*, on special demurrer, that the replication was good, inasmuch as the plea amounted only to matter of excuse for the nonperformance of the promise, and to one ground of defence only (a).

(a) See *Griffin v. Yates*, 2 Bing. N. C. 579; S. C. 2 Scott.

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son, and that in consequence of the representations made to him by the said *C. Anderson*, he the defendant was induced to draw and deliver, and he did then draw and deliver to the said *Anderson*, two promissory notes, whereby and by each of which the defendant promised to pay to his own order the sum of 250*l.*, three months after the date thereof, (one of them being the said note in the said first count mentioned), upon the faith of and promise from the said *Charles Anderson*, that the said notes should be renewed when due, for the space of two years, and that he should receive from the said *Charles Anderson*, on a certain day, to wit, the *Friday* then next following, being, to wit, the 1st day of *May*, 1835, the amount of the said notes, deducting discount and stamp. And the defendant further saith, that the said *Charles Anderson* did not nor would, either on *Friday*, the said 1st day of *May*, 1835, or at any other time, (although often requested so to do) pay to the said defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever; but on the contrary thereof, the defendant saith, that he the said defendant, to wit, on the said 1st day of *May*, 1835, by appointment of the said *Charles Anderson*, went to the said place, to wit, 12, *Fludyer Street*, but the said *Charles Anderson* was not, nor was any such person, either then or at any time afterwards, there to be found, and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he holds the same without value or consideration, and that there never was and is not any consideration or value on the said note between any parties thereto; and he further saith, that the said *Henry Richardson*, and the said plaintiff, and each of them, at the several and respective times when the said note in the said first count mentioned was so indorsed and delivered to them respectively, as in the said first count mentioned, was privy to

and had full knowledge and notice of the said transaction in this plea detailed, and of the said fraud and imposition: and this the defendant is ready to verify.

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Replication.—That the defendant of his own wrong, and without the cause by him in that plea alleged, broke his said promise in the said first count mentioned, in manner and form as the said plaintiff hath in the said first count of the said declaration in that behalf complained against him, &c.

Special demurrer, assigning for causes—*First*, that the replication *de injuriâ* is a bad plea to the defendant's plea in *assumpsit*. *Secondly*, that the replication is bad for duplicity, because it is too large, and puts in issue all the several facts alleged by the plea, instead of putting in issue the point to be tried between the parties. *Thirdly*, that the facts of the fraud and notice to the plaintiff, and the want of consideration for the note in the plaintiff's hands, alleged by the plea, are distinct and separable facts, on either of which the plaintiff might and ought to have tendered an issue; and he cannot by his replication put both in issue; and the replication, because it puts both such facts in issue, is bad.

The case was argued in the present term, by *Hoggins*, in support of the demurrer; and by *Humfrey*, *contrâ*, in support of the replication.

The Court took time to consider, and the judgment of the Court was now delivered by

Lord ABINGER, C. B.—On this demurrer to the replication, two objections were made:—*First*, that its form was improper, as the inducement of *de injuriâ*, &c., was inapplicable to an action of *assumpsit*; and, *secondly*, that it was bad because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action.

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We think the replication is good, notwithstanding these objections.

This form, though most commonly used in actions of trespass, or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only matter of excuse for having committed that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse *absque tali causâ*, and thereby denied, as matter of excuse alleged for the breach.—*Per Lord Ellenborough, Barnes v. Hunt (a).*

No case in which this form of replication has been held to be improper, resembles the present. In *Crisp v. Griffiths (b)*, the plea was not matter of excuse for the breach of contract, but of subsequent satisfaction for that breach. In *Solly v. Neish (c)*, the plea was a denial of the promise. So, in *Whittaker v. Mason (d)*, the plea denied the contract as alleged; and although the Court intimated that it might be doubtful whether a traverse in this form was applicable to any action on promises, they abstained from deciding that question. On the other hand, in the case of *Noel v. Rich (e)*, this Court expressed a strong opinion that this general form of traverse, in a case similar to the present, was proper: and we think that it is; for the plea confesses, that the defendant made the note in question and indorsed it to *Richardson*, who indorsed it to the plaintiff, which constitutes a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission, by shewing that the note was made and indorsed without value *bond fide* paid, whereby the defendant was excused from performing that promise.

(a) 11 East, 455.

(b) 2 C. Mee. & Ros. 159.

(c) 2 C. Mee. & Ros. 355.

(d) 2 Bingham. New C. 359;
S. C. 2 Scott.

(e) 2 C. Mee. & Ros. 360.

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As to the objection that the replication is multifarious, the facts contained in the plea, though they are several, constitute one ground of defence; and the rule of pleading is not that the issue must be joined on a single fact, but on a single point of defence. This was laid down by Lord *Mansfield*, in *Robinson v. Raley* (a), by the Court of *King's Bench*, in *O'Brien v. Saxon* (b), and by Mr. Justice *Bayley*, in the case of *Carr v. Ilinchliffe* (c). In each of these cases, the facts there allowed to be included in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable, and levant and couchant, constituted one proposition, viz. that the cattle were entitled to common; in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of defence, viz. the bankruptcy of the plaintiff; and in the last, the facts of the goods, for the price of which the action was brought, being sold by an agent as principal, and a set-off of a debt due from the agent, constituted the defence of payment, or satisfaction of the plaintiff's demand.

So, in the present case, the plea contains in substance one ground of defence only, that is, that *the plaintiff was not the bonâ fide holder for value*, although several facts are necessarily averred as constituting parts of it. Every indorsee of a bill has his own title, and that of each intermediate party; and if he or any of such parties gave value for the bill without fraud, he is a holder for value. The plea in this case alleges in effect that the defendant had no value for making the note, and that neither the first indorsee, nor the second, received the bill *bonâ fide*, which is only a statement, necessary in point of law, of the several facts constituting the defence, that the plaintiff is not a *bonâ fide* holder for value.

If this replication were not allowed, some inconvenience

(a) 1 Burr. 316.

(b) 4 D. & R. 579; 2 B. & C. 908.

(c) 7 D. & R. 42; 4 B. & C. 547.

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would follow, for in every action on a bill or note, it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it. For it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such an allegation; and then he would be obliged to take an issue which would admit the fraud, and throw the proof of value on himself, thereby placing him in a worse situation than before the late rules. On the other hand, if this replication be allowed, the indorsee is left in the same situation as he was before, with the additional advantage that he is made acquainted with the defence intended to be set up, which was one great object of the pleading regulations; and he will be called upon to prove value given or not, accordingly as the defendant shall prove or fail in the proof of the allegation of fraud, as he would before under the general issue.

We do not, however, decide this case on the ground of convenience, but in conformity with the established rules of pleading; and we are of opinion that the demurrer must be overruled.

Judgment for the plaintiff.

LANE and Another v. BENNETT.

Ireland is still a place beyond the seas, within 4 Anne, c. 16, s. 19, notwithstanding the Act of Union, and the 3 & 4 Will. 4, c. 42, s. 7 (a).

DEBT for goods sold, money lent, &c.—Pleas, *nil debet*, and the Statute of Limitations.—Replication to the second plea, that the defendant, before and at the time when the said several debts and causes of action in the declaration mentioned accrued to the plaintiff, was in parts beyond the seas, to wit, *in Ireland*, and that the defendant afterwards,

(a) See *Battersby v. Kirk*, 2 Bing. N. C. 584; S. C. 2 Scott.

to wit, on the 1st of *January*, 1831, returned from the said parts beyond the seas into this kingdom; which said return of the defendant was his first return into this kingdom from the said parts beyond the seas after the accruing of the said several debts and causes of action; and the plaintiffs further say, that they commenced their suit thereupon in this action against the defendant within six years after the defendant's said first return into the kingdom after the accruing of the said several debts and causes of action.—Verification.

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Rejoinder—that at the time when the said several supposed debts and causes of action in the declaration mentioned accrued to the plaintiffs, he the said defendant was not in parts beyond the seas, &c., and issue thereupon.

The cause was tried at the Sheriff's Court, in *London*, before Mr. Serjeant *Arabin*, on the 29th of *April* last, when, the plaintiff having recovered a verdict,

Steer, in *Easter* Term last, obtained a rule for a nonsuit, or for judgment *non obstante veredicto*, on the ground that *Ireland* was not now a place beyond the seas, within 4 *Anne*, c. 16, s. 19.

Erle shewed cause, and *Steer* was heard in support of the rule; but the arguments are so fully stated in the judgment of the Court, that it is thought unnecessary to report them here.

The Court took time to consider, and the judgment of the Court was now delivered by

LORD ABINGER, C. B.—In this case, to a plea of the Statute of Limitations to an action for goods sold, the plaintiff replied that the defendant was, when the cause of action accrued, in parts beyond the seas, to wit, in

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Ireland; and it appeared on the trial before my Brother *Arabin*, that the defendant was in *Dublin* at that time: and the question is, whether *Ireland* be now a place “beyond the seas,” within the meaning of the 4th *Anne*, c. 16, s. 19, which provides, that if a defendant in certain actions, at the time of the cause of action accrued, shall be beyond the seas, the person entitled to such action shall be at liberty to bring his action against such person after his return from beyond the seas, within the time specified in that act and the 21st *Jac.* 1, c. 19.

Ireland, before the Union, was unquestionably a place “beyond the seas.” In *Nightingale v. Adams* (a), it was so ruled by Lord *Holt*, on consideration. It must therefore remain so still, unless the Act of Union, or some other statute, has otherwise provided.

It was contended by the defendant, that *Ireland* is not now a place beyond the seas, for two reasons—*first*, because it has been enacted not to be so by the statute 3 & 4 *Will.* 4, c. 42, s. 7 (b); and, *secondly*, because it ceased to be so by the Act of Union.

The statute 3 & 4 *Will.* 4, c. 42, s. 7, provides, that no part of the United Kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, &c., being part of the dominions of His Majesty, shall be deemed to be beyond the seas within the meaning of the act, or of the act passed in the 21st year of the reign of King *James* the First, intituled, “An Act for Limitation of Actions, and for avoiding of Suits in Law.”

This clause, it will be observed, altogether omits to mention the 4 & 5 *Anne*, c. 16, s. 19; and therefore it cannot have the effect of altering or explaining the meaning of the words “beyond the seas” in that act, unless we are enabled to give such a construction to the clause

(a) 1 Show. 91.

3 & 4 *Will.* 4, c. 27, s. 19, but

(b) There is a similar clause in applicable to that act only.

in question, in furtherance of the intention of the Legislature, as to include it; or unless this section of the statute of *Anne* can be considered, in some sense, as an appendix to, or part of the statute 21 *Jac.* 1, and virtually included in any statutory explanation of it.

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We cannot, we think, put any such construction on the 7th section of the 3 & 4 *Will.* 4, c. 42, as to include the statute of *Anne*, when *another* statute is expressly mentioned; the words are precise and clear, and incapable of being construed to include any other statute, by any latitude of construction; and besides, we cannot predicate with certainty that the legislature really meant to include the cases provided for by the statute of *Anne*; for some reason may be given, and was given at the bar, for excluding them.

The great probability, however is, that the omission to name the statute 4 & 5 *Anne*, is an oversight; but even if we were quite satisfied that it was so, we could not supply the defect. “A *casus omissus* can in no way be supplied by a Court of law, for that would be to make laws.”—*Per Buller, J.*, 1 T.R. 72.

The next question then is, whether the statute of *Anne*, or rather the 19th section of it, can in any way be considered as an extension of, or appendix to, the statute of 21 *Jac.* 1, and virtually included in it.

We think it cannot: for it is not part of any act for the amendment or exposition of the statute of *Jac.* 1; it is part of a general statute for the amendment of the law, containing numerous provisions affecting many branches of the law; and the statute of *James* is referred to in this section, not as a statute to be explained, but merely to incorporate, by reference, the times fixed by that statute.

The case of *Bayly v. Murin* (a), cited at the bar, differs

(a) 1 Vent. 244.

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from this, because there the 14 *Eliz.* c. 11, which Lord *Hale* (in opposition to the opinion of two other Judges) considers as an appendix to the 13 *Eliz.* c. 10, was intituled "An Act for the Continuation, Explanation, Perfecting, and Enlargement of divers Statutes," and, amongst others, applied to the 13 *Eliz.* c. 10: and besides, the 18 *Eliz.* c. 11, which he thought extended to concurrent leases granted under 14 *Eliz.*, merely *recited* the 13th *Eliz.*, but contained *general* words, applicable to *all* leases, whether granted under one statute or another; if the 18 *Eliz.* had enacted that concurrent leases *granted under the statute* 13 *Eliz.* c. 10, should be good, it would have been more applicable to the present case, but it does not.

For these reasons, we are of opinion that the statute 3 & 4 *Will.* 4, cannot be construed to extend to the 4th *Anne*, c. 16.

The remaining question is, whether the Act of Union had the effect of causing *Ireland* to cease to be a place beyond seas, within the meaning of the statute of *Anne*. Lord *Coke*, 1 *Inst.* 260. b., in his commentaries on *Littleton*, section 439, who speaks of "one out of the realm in the King's service," explains that passage by the words "out of the power of the King of *England*, as of his crown of *England*;" and, referring also to section 677, where *Littleton* uses the words "*auster le mare*," has this commentary—"and note, *Littleton* saith, not 'beyond the sea,' or '*extrà quatuor maria*,' for a man *reverà* may be *intrà quatuor maria*, and yet out of the realm of *England*. But *intrà quatuor maria*, or *extrà*, is taken by *construction* to be within the realm of *England*, or the dominions of the same;" from which it appears to have been the opinion of Lord *Coke*, that the expressions were in effect synonymous, and the phrases "beyond or within the sea," or "out of or in the realm," have been used indiscriminately in different statutes. By

18 *Edw.* 1, st. 4, *modus levandi fines*, fines conclude such as are "within the four seas," and it appears from a case cited by Lord *Dyer*, in *Plowden*, 376, that *Scotland* was "beyond seas," within the meaning of this statute. The 1 *Rich.* 3, c. 7, relating to fines, uses the expression "out of this land." The 4 *Hen.* 7, c. 24, has the same expression, and *Ireland* has been held to be "out of the land," under that statute. 7 *Coke* 39, *Calvin's case*. The 27 *Elix.* c. 9, s. 111, has the phrase "beyond the seas." The Statute of Limitation, 32 *Hen.* 8, c. 2, s. 8, uses the words "out of this realm of *England*;" and the stat. 21 *Jac.* 1, c. 16, s. 2, "beyond the seas." However, in the case of *The King v. Walker (a)*, the Court of *King's Bench* considered that the words were not synonymous, and that the expression "beyond the seas" was properly introduced to meet the case of *Scotland*, and decided that that kingdom was not "beyond the seas;" and this decision is in accordance with *Jenkins's Century*, case 18, where, after stating that if the husband be in *Ireland* or *Scotland* for a year, and the wife in *England* during this time has issue, this issue is a bastard, it is said that "it seems to the reporter, that at this day it is otherwise for *Scotland*, for both are become under one king, and they are one continent of land."

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If, then, the expression "beyond the seas," in the stat. 21 *Jac.* 1, and 4 *Anne*, c. 16, is to be taken in a different sense from the words "out of the land, or of the realm," and to refer to locality, *Ireland* still remains so, notwithstanding the Act of Union, for that act does not contain any provision to the contrary. If, on the other hand, these expressions are to be construed as equivalent, and "beyond the seas," in these statutes of *James* and *Anne*, means "out of the realm," that is out of the realm of *England*, the Act of Union does not bring *Ireland*

(a) 1 Sir W. Blac. 286.

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within *that* realm, or make it parcel thereof, or declare that it shall be so considered, but it forms one new united kingdom of both, and provides that all the laws then in force in each shall remain as by law established in each. Any one, therefore, in *Ireland*, is still out of that which was the realm contemplated by the two statutes of 21 *Jac.* and *Anne*, (supposing “beyond seas,” and “out of the realm,” to be synonymous), although *England* has ceased to be a separate kingdom.

We therefore think that *Ireland* is not, by the Act of Union itself, constructively brought within the limits of the four seas, or made part of the realm of *England*. And this view of the case is sanctioned by the 7th clause in 3 & 4 *Will.* 4, c. 42, which is an enacting and not a declaratory clause; and shews the opinion of the Legislature, that without such a clause, *Ireland* would still be “beyond the seas.”

The cases which have been decided on the writ of *ne exeat regno* are also authorities to the same effect, for they were decided on the ground that, notwithstanding the Union, *Scotland* was still out of the realm, within the meaning of the writ, the operation of which was not affected by the Union; *Done's case* (a), *Bernal v. Marquis of Donegal* (b); but in *Done's case*, the condition of a recognizance was altered, to exclude the power of going to *Scotland*, which otherwise at the time would have been included in what *then* was the *realm*.

The rule must therefore be discharged.

Rule discharged.

(a) 1 P. W. 262.

(b) 11 Vesey, 46.

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CASE for an injury to the plaintiff's reversionary interest.—The *first* count of the declaration stated that, before and at the time of committing the grievances by the defendants thereafter mentioned, certain closes, pieces or parcels of land, hereditaments, and premises, with the appurtenances, of and belonging to the plaintiffs, commonly called and known by the name of *Llaethdu*, situate and being at the parish of *Amlwch*, in the county of *Anglesey*, together with a certain pool or pond of water then being in and upon one of the said closes and pieces or parcels of land of the said plaintiffs, were in the possession and occupation of certain persons, as tenants thereof to them the said plaintiffs, the reversion of and in the said closes, &c., expectant on the termination of the said *tenancy*, then and still belonging to the said plaintiffs, which said pool or pond of water, from time whereof the memory of man is not to the contrary, hath been and still of right ought to be fed and supplied with water from and by a certain stream or watercourse, and which during all the time aforesaid ran and flowed, and still of right ought to run and flow, unto, into, over, and along the said closes, &c., unto and into the said pond or pool of water, the water of which stream or watercourse, and of the said pool or pond of water so situate and being in and upon one of the said closes, &c., was, during all the time aforesaid, of great use, benefit, and advantage to the said plaintiffs and others, the owners of the said closes, &c., and their tenants thereof for the time being, for irrigating, watering, and improving the soil of the said closes, &c., yet the defendants, contriving, &c., to injure the plaintiffs in their reversionary estate and interest of and in the said closes, &c., and the said pool or pond of water so situate and being in one of the said closes as aforesaid, whilst the

A claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse, within the 2nd section of 2 & 3 Will. 4, c. 71.

In a plea under the statute 2 & 3 Will. 4, c. 71, it is sufficient to allege that the user had existed for forty years before the commencement of the suit, and it need not be alleged to have been for forty years before the act complained of in the declaration.

A replication of a life estate to a plea of enjoyment for forty years, under the statute 2 & 3 Will. 4, c. 71, must shew that the plaintiff is

the person entitled to the reversion expectant on the determination of the life estate.

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said closes, &c., were so in the possession and occupation of the said tenants thereof to the said plaintiffs as aforesaid, and whilst the said plaintiffs were so interested therein as aforesaid, heretofore and before the commencement of this suit, to wit, on the 1st of *January*, 1833, made and sunk, and caused to be made and sunk, in and upon certain lands and premises contiguous and near to the said closes, &c., of the said plaintiffs, and near to the said stream or watercourse, from and by which the said pool or pond of water so situate in and upon one of the said closes, &c., of the said plaintiffs as aforesaid, was during all the time aforesaid, and still of right ought to be, fed and supplied as aforesaid, divers to wit, ten precipitate pits, ten other pits, ten holes, and divers other works, and put, placed, and laid into the said several pits, holes, and works, divers large quantities of iron and other metals and metallic substances, and then covered the said iron and other metals and metallic substances with water, in the said pits, holes, and works, and kept and continued the said iron and other metals and metallic substances so covered with water in the said pits, &c., for divers long spaces of time then next following, whereby the said water therein became and was mixed and impregnated with iron and other metallic and noxious mineral substances, and afterwards, to wit, on &c., and on divers other days, &c., wrongfully and injuriously let off, emptied, and discharged the said water so mixed and impregnated with iron and other metallic and noxious mineral substances as aforesaid, from and out of the said pits, holes, and works, unto and into the said stream or watercourse so running and flowing into, through, over, and along the said closes, &c., of the said plaintiffs, and from and by which the said pool or pond of water was, and still of right ought to be, fed and supplied as aforesaid, whereby the water of the said stream or watercourse, and of the said pool or pond so situate in and

upon one of the said closes, &c., of the said plaintiffs as aforesaid, and so fed and supplied by and from the said stream or watercourse as aforesaid, became and was impregnated with the said metallic and noxious mineral substances with which the water so let off, emptied, and discharged by the said defendants from and out of the said pits, holes, and works, into the said stream or watercourse as aforesaid, was so mixed and impregnated as aforesaid, and the banks and edges of the said part of the said stream or watercourse so running and flowing into, through, over, and along the said closes, &c., of the said plaintiffs as aforesaid, and of the said pool or pond of water so situate and being in and upon one of the said closes, &c., of the said plaintiffs, became and were covered, and the bottom and bed of the said pool or pond of water became, and was, and still is, choked and filled up with a certain noxious sediment, stratum, or deposit arising from the settling of the said metallic and noxious mineral substances with which the said water so let off, emptied, and discharged by the said defendants, from the said pits, holes, and works as aforesaid, were so mixed and impregnated as aforesaid, and by reason of the bottom and bed of the said pool or pond of water so being choked and filled up with the said noxious sediment, stratum, and deposit as aforesaid, the water thereof so mixed and impregnated with the said metallic and noxious mineral substances as aforesaid, overflowed and inundated a great part, to wit, 100 acres of the said closes, &c., of the said plaintiffs, by reason of all which said several premises, the said closes, &c., and the soil thereof, have been and are greatly impoverished and deteriorated, and the reversionary estate and interest of the said plaintiffs of and in the same hath been and is, by means of the premises, very much injured, &c. There was another count, not substantially differing from the first.

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The defendants pleaded—*First*, not guilty. *Secondly*,

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that before and at the time of the committing of the grievances, &c., the Most Noble *Henry William*, Marquis of *Anglesey*, was the occupier of the said lands and premises in and upon which the said pits, holes, and works were so made and sunk, as in the first count mentioned, and was also the occupier of a certain mine, to wit, a copper mine, on the said land and premises, and which said mine, for a period exceeding the period of forty years next before the commencement of this suit, and also at the time of the committing of the said grievances, had been and was worked by the occupier thereof for the time being. And the defendants further say, that the said Marquis, and all the occupiers for the time being of the said mine, and of the said land and premises wherein the said pits, holes, and works were so made and sunk as in the first count mentioned, for the full period of forty years *next before the commencement of this suit*, have without interruption, and as of right, made and sunk, and caused to be made and sunk, in and upon the said lands and premises, such pits, holes, and works, as from time to time were convenient and necessary for placing therein the water from time to time raised or pumped out of the said mine, and for the precipitation of the copper contained in the said water; and the said Marquis, and all the occupiers for the time being of the said mine, lands, and premises, for the purpose of such precipitation of the copper contained in the water so from time to time raised and pumped out of the said mine, have from time to time, for and during all the said period of forty years, without interruption, and as of right, put, placed, and laid into the said pits, holes, and works, such iron and other metals and metallic substances as to them seemed convenient and necessary, and there, in the said pits, holes, and works, covered the same with the water from time to time raised and pumped out of the said mine, and caused to run and flow into the same pits, holes, and works, and have kept and continued the said iron and

other metals and metallic substances so put, placed, and laid, and so covered with the said water, in the said pits, holes, and works, for such long spaces of time as to them seemed convenient and necessary; whereby the said water in the said pits, holes, and works, during all the said period of forty years necessarily and unavoidably became and was mixed and impregnated with iron and other metallic and noxious mineral substances. And the defendants further say, that the said Marquis and all the occupiers for the time being of the said mine, and of the said lands and premises wherein the said pits, holes, and works were so made and sunk, as in the first count mentioned, for and during the full period of forty years, have at his and their free will and pleasure, without interruption, and as of right, let off, emptied, and discharged, and of right ought to have let off, emptied, and discharged, and still of right ought to let off, empty, and discharge the said water so mixed and impregnated with iron and other metallic and noxious mineral substances from and out of the said pits, holes, and works unto and into the said stream or watercourse in the first count mentioned, and so running and flowing into, through, over, and along the said closes, &c. in that count also mentioned. Wherefore the said defendants, then being the servants of the said Marquis, and acting by his command, at the said time when &c. in the first count mentioned, made and sunk, and caused to be made and sunk, in the said land and premises, the said pits, holes, and works, in that count mentioned, the same then being convenient and necessary pits, holes, and works, for the placing therein the water from time to time raised and pumped out of the said mine, and for the precipitation of the copper contained in the said water; and the said defendants, as such servants of the said Marquis, and by his command, at the time when &c., for the purpose of the precipitation of the copper contained in the water so from time to time

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raised and pumped out of the said mine, put, placed, and laid iron and other metals, and metallic substances, into the said pits, holes, and works; and there, in the said pits, &c., covered the said iron and other metals and metallic substances with water, raised and pumped out of the said mine, and caused to run and flow into the said pits, &c., and kept and continued the same iron and other metals and metallic substances so covered with water in the said pits &c., for the said spaces of time in the first count mentioned; whereby the said water necessarily and unavoidably became and was mixed and impregnated with iron and other metallic and noxious mineral substances. And the defendants, as such servants of the said Marquis, and by his command afterwards, and at the said several times when &c. in the first count mentioned, let off, emptied, and discharged the said water, so mixed and impregnated as in this plea mentioned, from and out of the said pits, &c., unto and into the said stream or water-course in the first count mentioned, as it was lawful for them to do, which are the said several grievances in the first count mentioned, and whereof the said plaintiffs have above in that count complained against them, the said defendants.—Concluding with a verification.

The replication to this plea stated, that one *Rice Thomas*, before and at the time of the making of the indenture of bargain and sale therein-after mentioned, was seised in his demesne as of fee of and in the said closes &c. in the first count mentioned. And that being so seised, the said *Rice Thomas* afterwards, and before the commencement of the said term of forty years in the second plea mentioned, and also before the time of the committing of the grievances in the first count mentioned, by certain indentures of lease and release, and settlement, dated the 20th and 21st of *July*, 1798, (which were fully stated in the replication,) conveyed the said closes, pieces, or parcels of land, hereditaments and premises, in the

first count mentioned, unto *John Lloyd* and *Robert Thomas*, their heirs and assigns, to hold to them, their heirs and assigns, to and for the several uses, trusts, intents and purposes therein-after expressed and declared of and concerning the same, viz.:—to the use of such person or persons, for such estate or estates, &c., &c., as the said *Rice Thomas* and *Margaret* his wife should, by any deed or deeds, executed in manner therein mentioned, direct, limit, or appoint; and in default of and until such direction, limitation, or appointment, &c., &c., to the use of the said *Rice Thomas*, and his assigns, for and during the term of his natural life, without impeachment of waste. The replication then stated, that, by the indenture of release, it was provided, that the said *Rice Thomas*, and all and every other person or persons, who should become seised in possession of the freehold of the premises, by virtue of the limitations aforesaid, should and might have full power and authority to grant, let, or make any lease or leases of the said premises, or any part or parcel thereof, *by indenture*, for one, two, or three life or lives, or for any term or number of years determinable on the death of one, two, or three person or persons, or for any number of years not exceeding twenty-one years, in possession, and not in reversion, (upon certain conditions therein mentioned, and which it is unnecessary to state). By virtue of which said last-mentioned indenture, and by force of the statute made for transferring uses into possession, afterwards, and before the commencement of the said term of forty years in the said second plea mentioned, to wit, on &c., and before the time of making the indenture hereinafter mentioned, he, the said *Rice Thomas*, became and was seised in his demesne as of freehold, for the term of his natural life, of and in the said closes, pieces, or parcels of land, hereditaments, and premises, in the first count mentioned, and remained and continued so seised, until and at the time of making the indenture here-

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inafter mentioned; no direction, limitation, or appointment of the said closes, pieces, or parcels of land, hereditaments, and premises, in which, &c., in the first count mentioned, or any part thereof, at the time of making that indenture, having been made by the said *Rice Thomas* and *Margaret* his wife, according to the form and effect of the said indenture of the 21st *July*, 1778, in that behalf. And the said *Rice Thomas* being so seised thereof, as aforesaid, and seised in possession of the freehold of the said closes, pieces, or parcels of land, hereditaments and premises, in which, &c., in the first count mentioned, by virtue of the limitation in that behalf aforesaid, and under and by virtue of the said power and authority in such case reserved by the said indenture as aforesaid, afterwards, to wit, on the 12th *November*, 1779, by a certain *indenture* then made between the said *Rice Thomas* of the one part, and *Edward Hughes* and *Thomas Williams* of the other part, *enfeoffed* the said *Edward Hughes* and *Thomas Williams* of the said closes, pieces or parcels of land, hereditaments, and premises, in the first count mentioned, to have and to hold the same, with their appurtenances, unto the said *Edward Hughes* and *Thomas Williams*, their heirs and assigns, as tenants in common, and not as joint tenants, from the day and year next before the date of that indenture, for and during the term of the natural lives of *William Lewis Hughes*, now the Right Honourable Lord and Baron *Dinorben*, *Owen Williams*, and *John Davies*, and the life of the longest liver of them, at and under a certain yearly rent and services, being so much as were at the time of the said indenture of the 21st *July*, 1778, reserved and payable for the same; which said rents and services were to continue due and payable during the continuance of the said last-mentioned lease, which said last-mentioned lease was not made dispunishable of waste. And the said *Edward Hughes* and *Thomas Williams* did, at the time of making the said indenture of lease, duly

execute a counterpart thereof, which was had and taken by the said *Rice Thomas* accordingly. By virtue of which feoffment the said *Edward Hughes* and *Thomas Williams*, afterwards, to wit, on the said 12th day of *November*, 1779, became and were seised of and in the said premises, by the said last-mentioned indenture demised and granted as aforesaid, according to the form and effect of the said indenture of feoffment; and the said plaintiffs further say that the said term by the said indenture of feoffment created was at the time of the committing of the grievances by the said defendants in the first count mentioned and still is subsisting, he the said *William Lewis Hughes*, now Lord *Dinorben*, during all the time aforesaid, and still, being alive.—Verification.

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There was a second count and plea, and replication thereto, in substance the same as the pleadings above set forth.

Demurrer to these replications, assigning the following causes:—That the said replications respectively alleged, that, by indenture of the 21st *July*, 1778, in the said replications respectively mentioned, a power of leasing for lives or years was reserved to the said *Rice Thomas*, and all and every other person or persons who should become seised in possession of the freehold of the premises by virtue of the limitations in the said indenture contained; and that, by virtue of the limitations in that behalf, and by virtue of the power and authority in such case reserved by the said indenture, the said *Rice Thomas* by indenture enfeoffed *Edward Hughes* and *Thomas Williams* of the said closes, &c. in the several counts of the declaration first mentioned, by which mode of pleading the said plaintiffs leave it uncertain whether they intend to rely on the indenture last mentioned as a feoffment, or as an appointment under the said power of leasing; and the said defendants cannot in their rejoinders traverse the effect of the said indenture as by law they are entitled to do: also, that if the said plaintiffs intend to rely on the said inden-

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ture as an appointment, they ought in their replications to have pleaded the same according to the legal effect thereof, and to have averred that the said *Rice Thomas* appointed the said closes, &c. to the said *Edward Hughes* and *Thomas Williams*, instead of averring that he enfeoffed them thereof. Also, that if the said plaintiffs intend to rely on the said indenture as a feoffment, they ought to have shewn that livery of seisin was made, whereas such livery cannot be implied in the word enfeoffed, as the same is used in the said replications; also that profert is not made of the said indenture in the said replications respectively mentioned; also, that the said indenture being made by the said *Rice Thomas*, who appears by the said replications to have been a tenant for life only, the continuance of his life ought to have been averred.

Joinder in demurrer.

The points stated for argument on the part of the defendants were—that it is equivocal whether the plaintiffs rely on the indenture in the replications lastly mentioned as an appointment under the power of leasing or as a feoffment, and that the defendants cannot safely rejoin by traversing an appointment, or shewing the avoidance of the estate for lives created by the feoffment.

That a feoffment cannot be by deed alone; and that, by the form of the allegation, the implication of livery being excluded, profert of the deed ought to have been made.

That if the indenture is insisted on as an appointment, it ought to have been pleaded according to its legal effect.

That, though in the word “enfeoffed” livery is implied, there cannot be such implication where it is alleged that a person “by indenture enfeoffed,” and “that the lessees by virtue of the *indenture of feoffment* became seised,” and the lease for lives becoming void on the death of the tenant for life, his life ought to have been averred, and not being so, it does not appear that the ac-

tion has been brought within three years after the end or determination of the lease (a). *Exch. of Pleas,*
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On the part of the plaintiffs—that the pleas were bad,

1. Because the case is not within the stat. 2 & 3 Will. 4, c. 71.

2. Because the time is not alleged to have run before the act complained of.

And they submitted that their replication was good,

1. Because it is pleaded in the usual form.

2. Because it shews that the feoffment therein mentioned was intended as an execution of the power stated.

Wightman, in support of the demurrer.—One objection to the plea is, that although it states a user for forty years before the commencement of the suit, it is not stated to have existed for forty years before the time when &c., in the declaration mentioned. But it is submitted that, according to the very words of the act 2 & 3 Will. 4, c. 71, the plea is sufficient.

The 2nd section enacts, “ That no claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed or derived upon, over, or from any land or water, &c., when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated: and when such way or other matter as herein before last mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall

(a) Referring to sect. 8 of the 2 & 3 Will. 4, c. 71.

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appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

The 4th section provides that the period mentioned in the act shall be deemed and taken to be the period next before *some suit* or action, wherein the claim to which such period may relate shall have been or shall be brought into question. If the party does not commence his action till forty years have expired from the first user, a conclusion arises that the acts of user during the whole period were of right. If, as contended for on the other side, it were necessary to allege in the plea, that the user was not only for forty years before the commencement of the suit, but before the time when &c., the object of the act would be defeated; for the statute supposes a series of acts extending over a period of forty years; and if the defendant were to plead a forty years' user before the time when &c., the plaintiff might oblige him to prove a user for forty years before the first of the acts complained of, and so extend his proof to a period extending far beyond forty years. The statute has fixed a time, and says, if you do not bring an action within forty years, the right shall be deemed absolute. The statute no doubt meant to make it necessary that a party should take care that forty years should not elapse before complaint was made. It says that a user of twenty years shall give a *prima facie* title, and a user of forty years an indefeasible title. The action may be brought for any one act committed during the forty years; but if the action is not brought within forty years from the first act done, then the statute presumes that a continuance of acts of that nature were of right during the whole period. [*Parke, B.*—If you are allowed to use it so long, then the statute says that you shall have the right indefeasible. You say this is the proper mode of pleading it, because there is a right by relation back.] We do, and this view of the

case is supported by *Rex v. Inhabitants of Calow* (a). With respect to the right claimed, it is clearly an easement within the words of the 2nd section, which apply to all easements; but the words of the 8th section apply only to ways or watercourses, or use of water, and the word easement is omitted.

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Then as to the replication. The case of *Bright v. Walker* (b) will no doubt be relied upon; but this case is wholly dissimilar from that. This replication merely shews that, sixty years ago, *Rice Thomas* granted a lease for lives to persons with whom the plaintiff has shewn no connexion. In *Bright v. Walker* the connexion between the parties was shewn. The plaintiff here ought to have shewn some connexion with *Rice Thomas*, instead of which he only shews that one of the lives is still in existence. Besides, it does not appear that the condition upon which, by the 8th section of the act, the time of the duration of the tenancy for life is excepted, occurs in this case, for the plaintiff does not shew that he is entitled to the reversion at the end of the lease for lives. Another objection is to the form of the replication. The plaintiff has made it equivocal whether he meant to treat this as a feoffment or as a conveyance under the power. By the proviso in the settlement, *Rice Thomas* has power to grant leases *by indenture*; and the replication states that he by indenture enfeoffed, which is not the proper mode of pleading. If it is meant as a feoffment, then the defendants have no right to *oyer*. If he had said that he granted a lease according to the power by indenture, then he should have made a profert, and the defendants would have been entitled to *oyer*.

John Jervis, contra.—The pleas are bad in substance; and, as both special pleas are substantially the same, it will be sufficient to point out the objections to the first special plea. That plea is bad, because the right claimed

(a) 3 M. & S. 22.

(b) 1 C. M. & R. 211.

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by that plea is not within the stat. 2 & 3 *Will.* 4, c. 71; and if so, the plea should have been drawn according to the old form, and the right claimed by prescription only. It is clearly not within section 1; but it is said to be within the provisions of section 2. It is not a way—it is not a use of water enjoyed upon, or over, or derived from the land of another; neither is it a watercourse derived from the land of another. Is it a watercourse over the land of another? It is not so claimed. The claim is in substance for the occupier of the mine and land to sink precipitate pits upon his own land, to fill such pits with iron, to cover the iron with water pumped from the mine, to continue the copper water in the pits until the copper is deposited, and then to let off the water impregnated with metallic substances into the stream; thus claiming no right to the watercourse itself, but merely a right to impregnate the *water* with the substances of which the plaintiffs complain. It is, in fact, an easement, by which the occupier of the mine is entitled to dirty the water which flows to the plaintiff's land. But such an easement is not within the statute. The words "other easement," in section 2, must mean easements in the nature of a way; for otherwise the use of water and light, which are easements, would not have been particularized, all being comprehended within the general term. Again, the meaning of the word "easement" must be gathered from other parts of the statute; and if we find that "other easements" are omitted from provisions applicable to ways, watercourses, &c., without any reason, we must assume that these words were intended to apply only to easements in the nature of a way, and that the provisions which do apply to ways would be equally applicable to easements in the nature of a way. Now the 8th section, which regulates the computation of time, omits the word easement altogether, and speaks of a way or other *convenient* watercourse, or use of water; so that, as the computation of time was as essential in other easements as in

ways or watercourses, it is obvious that the words "other easements," in section 2, do not mean an easement different from those which are specifically enumerated in section 8. [*Parks, B.*—The right claimed is a right to turn water over your land. What is that but a claim to a water-course, within the meaning of the 2nd section?] *Secondly*, the pleas are bad, because they shew no justification at the time when the act was done: the time is not alleged to have run before the act complained of, and it is consistent with the pleas that the defendants may have been wrongdoers when the act was done, although, when *the suit was commenced*, the full period of forty years may have been completed. It is contrary to principle that an act at one time wrongful should be purged by a continuance of wrong, and that a mere omission to commence an action should make that right, which, if the action had been brought one day earlier, would have been without justification; for it must be remembered that this is not a statute of limitations to bar a remedy after length of time. The sect. 2 accords with this view of the case, and presents no difficulty, for it says, that the *claim* after *actual enjoyment without interruption* for a certain time shall not be defeated, and so legalizes the claim without interfering with the remedy for an act which, before the time has run, would be wrongful. The difficulty, however, arises upon sect. 4, which the defendants say justify them in the form in which these pleas are drawn. If that section be construed strictly, no right can be established unless it be made the subject of an action, for the periods are to be taken to be those next before some suit in which the claim shall have been brought in question. Again, if *A.*, one week after thirty-nine years have expired, interrupts *B.* in the exercise of a right, and, satisfied with *B.*'s acquiescence, brings no action against him, but *B.* before the year after the interruption is complete, but after the forty years have run, brings his action against *A.*, *B.*'s title is perfect,

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and he has damages against *A.* for doing that which he was at the time entitled to do; for the interruption not having been acquiesced in for a whole year, is no interruption, and before the commencement of the suit the forty years which perfect *B.*'s title are complete. In fact, no interruption without an action can ever defeat such a claim; for, if *B.* annually asserts his claim, and *A.* as constantly resists it, if *B.* does not suffer a full year to elapse between the interruption and the assertion of his claim, he may, having perhaps committed thirty-nine trespasses, at the end of forty years, perfect his title by bringing his action against *A.* The 4th section, if construed literally, conflicts with other parts of the statute. Sect. 2 says, for the purposes of this case, that no claim shall be defeated after an *actual enjoyment* for the *full* period of forty years; and sect. 6, that no presumption shall be allowed upon proof of enjoyment for a less period than forty years; whereas, inasmuch as the action must be commenced after the act done, if you put a literal construction upon the 4th section, and say that the title shall be perfect if forty years have expired before the commencement of the suit, a presumption is made from an user for a less period than forty years, in violation of the section before referred to. Again, in the case of forty years, where the claim is absolute and indefeasible, if, after an enjoyment for thirty years, idiotcy or other incapacity intervene and fill up the period, the right of the trespasser will be perfect, and no remedy can be had for any injury, however great, which may have happened in the interval, for to such a case the section does not apply. These, and other inconveniences, which may be pointed out, shew the difficulty of construing the 4th section literally, all of which may be avoided by holding that that section was merely intended to require a continuous user of the right claimed, and to prevent a claimant from setting up acts at distant intervals, which together might make up the necessary period, but which

had not been regularly and continuously persisted in, though not formally interrupted. *Exch. of Pleas,*
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In addition to the technical objections which are pointed out by the demurrer, it has been urged that the replications are bad in substance, inasmuch as they do not trace to the plaintiffs the reversion expectant upon the determination of the estate for life. It was unnecessary so to do, but if necessary, the reversion is sufficiently shewn to be in the plaintiffs upon the whole record. The case of *Bright v. Walker* (a) is, upon the first branch of this proposition, an express authority; for, although the Court there decided upon the statute as applicable to a twenty years' enjoyment, the rule of construction must be the same here, inasmuch as that decision was founded upon the words "as of right," in the 5th section, which are alike applicable to both periods. According to that decision, the enjoyment must have been "as of right," that is, against all the world; and during a tenancy for life, the exercise of an easement will not affect the fee; so that, even though the reversion be not traced to the plaintiffs it is immaterial, for as the reversioner is not bound, the enjoyment has not been of right as against all the world, which the authority referred to shews to be necessary. It is true that the 8th section points out the person by whom the claim is to be resisted, and the time within which such resistance must take place; but until the term has expired and the three years have passed, the reversioner is not bound; and therefore, until that event has happened, it cannot be said, in the language of the 5th section, that the defendants have as of right enjoyed the easement which they now claim. "In the first place, the statute is for shortening the time of prescription, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give

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(a) 1 C. M. & R. 211.

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a good title against all. They are such as absolutely bind the fee in the land. And in the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute—valid as to some persons, and invalid as to others.”—(*Per Parke, B., in Bright v. Walker*). But, if it be necessary, the whole record shews the plaintiffs to be reversioners of the term. The declaration states them to be reversioners of a term in some persons, and the replication shews what that term is.

With respect to the form of the replications.—It is not denied that a feoffment is a due execution of the power; for, as the donee had several modes in which he might execute the power, he might adopt either at his option(a); and *Tomlinson v. Dighton* (b), and *Daniel v. Upley* (c), shew that a feoffment is a due execution of such a power. It is also clear that the donee intended to execute the power. This appears by the replication; and further, as the grant cannot take effect without the power, it must operate upon the power. *Scrope's case* (d), *Clere's case* (e). This being so, the feoffment is properly pleaded as such. *First*, livery of seisin need not be stated; for “all necessary ceremonies implied by law in the plea need not be expressed, as in the plea of a feoffment of a manor livery and attornment may be implied” (f). In *Jefferson v. Morton* (g), a feoffment is pleaded without livery, and in the notes (h) the same rule is repeated. *Secondly*, a profert is unnecessary: of a feoffment no profert is made; and if a deed operating under the statute of uses is pleaded, there is no necessity of making a profert (i); so that, in either

(a) Sugden on Powers, p. 231,
4th edit.

(b) 1 P. Wms. 149; 1 Salk. 239;
2 Sanders on Uses, 84.

(c) Latch, 139; Sir W. Jones,
137.

(d) 10 Co. 143 b.

(e) 6 Co. 18 a.

(f) Co. Lit. 303. b.

(g) 2 Saund. 9.

(h) 2 Wms. Saund 305, n. 13.

(i) 1 Wms. Saund. 9 a.

view of this instrument, a profert would not be required. *Thirdly*, the power required a counterpart, and the word "indenture" shews that such counterpart was made of that evidence of the feoffment which the Statute of Frauds, 29 Car. 2, c. 3, s. 1, requires to be in writing. At all events, the word "indenture" is but surplusage, and should have been made the ground of special demurrer. But, *fourthly*, the mode of pleading "by indenture enfeoffed" is correct, according to the precedents. The word "appoint" is unknown to pleaders, and all that is necessary, viz. to shew what has been done, so as to operate as an appointment, is here stated. In *Whitlock's case* (a), the plaintiff, in bar of the avowry, set forth a power for the lessor to make leases for lives, and stated that in execution of that power the lessor *demisit*, &c. But the very form occurs in Co. Entr. (b) where it is pleaded that *Thomas and Robert Norwich*, being so seised &c., before &c., to wit, on &c., *per eorum scriptum indentatum gerentem datum &c., de eisdem maneriis &c., feoffaverunt quosdam Heydon, &c.*; and although in a subsequent part of the entry it appears that profert was probably made of this instrument, yet that cannot affect the authority of the precedent, as profert of the feoffment was certainly unnecessary.

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Wightman in reply.—*First*, as to the retrospective effect of the forty years' enjoyment, the case of *The King v. Inhabitants of Calow* is an authority to shew that the subsequent enjoyment reflects back to the first act of enjoyment. It has been said on the other side, that if the defendants had used the watercourse for thirty years and a quarter, and then the plaintiff had stopped it, and the defendants had acquiesced in it for three years, then they would have

(a) 8 Co. 69; Co. Entr. 600.

(b) Page 217 b.

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had no claim, but the defendants would then not have been at all within the act. [*Parke, B.*—According to the literal construction, you may acquire a right by enjoyment for forty years, but it must be without interruption.] It would then be a question for the jury, whether it was enjoyed without interruption or not. If there has been an interruption acquiesced in for a year, then it may be admitted that the time must begin again. Wherever there has been an interruption, the party must take care that the period of a year elapses between that interruption and the expiration of the forty years, or he must bring his action. Then as to the replication, the plaintiff is bound to shew some connexion between himself and the tenant for life or the reversioner. The words of the 8th section must mean, held by some of the parties to the suit, or some one with whom they are connected. It must mean a person who had a right to resist. It allows only one person to resist after the expiration of forty years—that is the reversioner. The replication is therefore bad on this ground, as well as on the ground of informality.

Cur. adv. vult.

Lord ABINGER, C. B.—This is an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land; the declaration alleges, that the defendants made divers pits and holes upon a close adjacent to those of which the plaintiff is possessed of the reversion, over which last-mentioned closes there is a certain watercourse, in which the water has been accustomed to flow for the use of the tenants and occupiers; that these pits and holes were filled with water impregnated with iron and other metallic substances, which rendered the water impure, in which state the defendant caused it to be turned into the watercourse, and to be mixed with and to adulterate the pure water which would

otherwise have flowed over the plaintiff's land. To this the defendant pleads two pleas, which are substantially the same, viz. :—that the Marquis of *Anglesea* was the occupier of a copper mine, and of the closes upon which the pits and holes were sunk, and that he and all the occupiers of that mine for the space of forty years before the commencement of this suit have been accustomed and were and are entitled as of right to sink the pits and holes in these closes for the purpose of placing therein the water pumped out of the mine, and of precipitating the copper, and had for the same space of time before the commencement of this suit been accustomed of right, and without interruption, to cause the water after it was so used to flow down the watercourse in the declaration mentioned, over the closes therein mentioned; and, in effect, to do that of which the plaintiff complains; and then justifies the acts done by them as the servants of the Marquis of *Anglesea*, under the right so set up and exercised for above forty years before the commencement of this suit.

The replication sets forth, that *Rice Thomas* was seised in his demesne as of fee of the several closes over which the watercourse passes, and that by certain indentures of lease and release therein stated, his interest was conveyed to trustees for the uses therein mentioned, and one of which was to the use of *Rice Thomas* for life, with a power to *Rice Thomas* whilst so seised of the freehold for his life to grant leases, upon certain conditions therein named, by indenture; that *Rice Thomas*, by virtue of this settlement, did become seised of the freehold for his life; and that, whilst he was so seised, by virtue of the power therein contained, he did by indenture duly made between himself of the one part, and *Edward Hughes* and *Thomas Williams* of the other part, enfeoff the said *Hughes* and *Williams* of the said closes for and during the term of the lives of *William Lewis Hughes*, now Lord *Dinorben*,

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Owen Williams, and *John Davies*, and the longest liver of them; and the replication concludes by stating, that Lord *Dinorben*, one of the lives, is still in being.

To this replication there is a demurrer.

The first point to be considered in this case is, whether the pleas are bad in substance. Two objections were made to them:—first, that the right claimed of pouring dirty water into the watercourse in the plaintiff's land is not within the 2nd section of the statute 2 & 3 *Will. 4*, c. 71; secondly, that the pleas are bad, because the forty years' enjoyment is not stated to have been before the act complained of in the declaration, and justified by each of the pleas.

Upon the first of these objections the Court intimated a clear opinion in the course of the argument. We thought that the right in question was within the 2nd section, as being a claim to a *watercourse* over the land of another, and we have seen no reason to change that opinion.

The other objection requires more consideration.

It is said for the plaintiff, that, although the act in the 4th section expressly states that the periods of twenty and forty years shall be deemed and taken to be next before the commencement of some suit wherein the claim shall have been brought into question, yet that this enactment must be construed to mean, that the periods shall be those next *before the act complained of*, on account of the absurdities and inconveniences to which a literal construction of this provision would give rise.

One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added that *one* action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before *any* action. Another was, that, if the act be so construed, the

plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be, for each justifies an act done at a particular time by the defendant as being *then* lawful, and *then* done, *because* the defendant actually enjoyed the right of doing the same thing for a period of time *afterwards*: so that, it is said, the character of the act, whether it be wrongful or rightful, cannot be known at the time by the party doing it, but depends upon a subsequent event.

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We are of opinion, however, that it is impossible to construe the act of Parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription, before the act passed, were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment until that action was brought in which they came in question: and with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed that there is something of the same kind of incongruity, though by no means to the same extent, in the usual mode of pleading a prescription, which states that some person seised in fee, from time whereof the memory of man is not to the contrary, until and at the time when &c., and from *thence hitherto*, hath had and enjoyed, and hath been used and accustomed to have and enjoy, and *still* of right ought to have and enjoy, a particular easement; and then justifies the act done by reason of that enjoyment; which enjoyment is both before and after the time of such act. It appears to us that the statute in question intended to confer, after the periods of enjoyment

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therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance; and we think the pleas are, for these reasons, sufficient in point of law.

The next question is, whether the replications are good; and we are clearly of opinion that they are not.

The enjoyment of the right during forty years alleged in the pleas being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of forty years conditionally only; that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is, probably, *before* the end of three years) after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord *Dinorben*, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and, such period being complete, the defendant is entitled to an indefeasible right to the easement claimed.

Another objection was urged to the mode of stating the feoffment in the replication, upon which it is not necessary to enter.

We therefore think that the defendant is entitled to judgment; but, on account of the difficulty in construing the new act, and the importance of the case, the plaintiff may amend on payment of costs.

Judgment accordingly.

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ACTION on the case for falsely representing, in answer to inquiries on the subject, that the life interest of Lord *Edward Thynne* in the dividends, interest, and annual income of certain trust funds, of which the defendant was one of the trustees under his Lordship's marriage settlement, was charged only with three annuities; whereby the plaintiff was induced to advance to the said Lord *Edward Thynne* the sum of 999*l.* for the purchase of an annuity from the said Lord *Edward Thynne*, secured by his covenant, bond, and warrant of attorney, and also by an assignment of his interest in the dividends of the stock; whereas the defendant, at the time he so represented, well knew that the same funds were also charged with a mortgage for the sum of 20,000*l.*, &c.

Pleas.—*First*, not guilty; *secondly*, that the plaintiff was not, by the said supposed representations and assertions of the defendant in the declaration mentioned, induced to advance, nor did he in consequence thereof advance, the said sum of 999*l.* in the declaration mentioned, or any part thereof, or purchase of the said Lord *Edward Thynne* the said annuity therein mentioned, in manner and form &c.

The cause was tried before the Lord Chief Baron at the *Middlesex* sittings after last *Trinity* Term, when it appearing that the representation in question was made by parol, his Lordship nonsuited the plaintiff, being of opinion that such a representation was within the 9 *Geo.* 4, c. 14, s. 6. *Bompas*, Serjt., in *Michaelmas* Term last, having obtained a rule to shew cause why this nonsuit should not be set aside and a new trial had,

Sir *W. W. Follett* and *Channell* shewed cause, and

9 *Geo.* 4, c. 14, s. 6; *Parke*, B., and *Alderson*, B., were of opinion that it was not.

Action against the defendant for falsely representing that the life interest of *A. B.* in certain trust funds, of which the defendant was trustee, was charged with only three annuities, whereby the plaintiff was induced to advance a sum of money for the purchase of an annuity from *A. B.*, secured by his bond, &c., and also by an assignment of such trust funds; whereas the defendant, at the time he made such representation, well knew that the same funds were also charged with a mortgage for 20,000*l.* It appeared on the trial that the representation in question was made, if at all, by parol:—Lord *Abinger*, C. B., and *Gurney*, B., were of opinion that this was a representation concerning or relating to the credit and ability of *A. B.*, so as to come within the

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Bompas, Serjt., and *Erle* were heard in support of the rule.

The Court took time to consider; and, there being a difference of opinion amongst the Judges, they now delivered their opinions *seriatim*.

GURNEY, B.—This action was brought upon an alleged false representation of the defendant, that the marriage settlement of Lord *Edward Thynne* was charged with only three annuities; whereas it was charged, in addition, with a mortgage of 20,000*l.* to the Marquis of *Bath*, which the defendant knew. By this representation it is alleged the plaintiff was induced to advance a sum of money for the purchase of an annuity from Lord *Edward Thynne*, secured by his covenant, bond, and warrant of attorney, and also by an assignment of his interest in the dividends of the stock in which the portions forming the subject of the marriage settlement were invested, amounting altogether to 4333*l.* 6*s.* 8*d.*

It appeared at the trial that the representation (if ever made at all) was, at all events, made by parol; whereupon the Lord Chief Baron on that ground directed a nonsuit.

The question in this cause arises upon the 9th *Geo.* 4, c. 14, s. 6, which appears to have been enacted for the purpose of extending the operation of the Statute of Frauds, 29 *Car.* 2, c. 3. By section 4 of that statute it is enacted, “that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” This protected a person who was called upon to answer for the debt or miscarriage of another, unless he had made himself responsible in writing.

But a series of cases, commencing with the case of *Pasley v. Freeman* (a), had occurred, in which defendants were charged, not strictly and specifically as guarantees for the solvency of others, but on alleged representations and assurances respecting them and their credit or ability, averred to be false and fraudulent.

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There is no doubt that there have been many cases in which false and fraudulent representations of the ability of others have been made, in order to obtain credit for them, by which honest men have suffered. On the other hand, there has been but too much reason to fear that innocent persons have been the victims, not merely of intentionally false, but of unintentionally exaggerated statements of conversations.

If inquiry were made and information given respecting the credit or ability of the person whom the inquirer was called upon to trust either with money or with goods, the inquiry would be private, the communication would be private, and, if the inquirer was a competent witness, on his evidence alone, without the possibility of contradiction or explanation, the case must rest.

It had been a subject of complaint that these cases had trenched upon the security intended to be afforded by the Statute of Frauds, and it was considered by the legislature that a person so circumstanced was entitled to the same protection as the Statute of Frauds had given to the person whom a plaintiff sought to charge for the debt or miscarriage of another. To afford this protection, among other purposes, the statute of 9 Geo. 4, c. 14, was passed.

That act is intituled, "An Act for rendering a written Instrument necessary to the Validity of certain Promises and Engagements."

The 6th section enacts, "That no action shall be brought to charge any person upon or by reason of any

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representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, (which I have no doubt ought to be read, “ may obtain money or goods upon credit”), unless such representation or assurance be made in writing, signed by the party to be charged therewith.”

By this clause the protection is carried even farther than by the Statute of Frauds. There, the party might be charged on a writing signed by a person thereunto by the defendant lawfully authorized, which left him exposed to be charged by the verbal representation of another that he had authority to sign.

It is contended, on the part of the plaintiff, that this is not an inquiry concerning or relating to the ability of Lord *Edward Thynne*, but an inquiry into a particular fact respecting part of his property, and therefore not within the statute.

It is to be observed, that this is not an inquiry into the value of a thing which is to be purchased, but an inquiry into a portion of the ability of the borrower of money, who is to give both his personal security and the pledge of a particular fund. If it concerns or relates to his ability in any respect whatever, it seems to me to come within the act.

I consider it to be an inquiry into the ability of Lord *Edward Thynne* in respect of this property, the security of which, in addition to his personal liability, it was intended to take. Was Lord *Edward Thynne* able to give this security for the payment of the annuity? Had he the ability to charge this particular fund; that is, had he or not exhausted the fund? His ability is greater or smaller according to the extent of the property that he possesses, and the amount of the charges to which that property has been subjected.

Lord *Edward Thynne* wished to obtain money from *Lyde*; he must have represented, I presume, that he had the ability to charge this particular fund with the payment of the annuity. The inquiry made of the defendant is as to Lord *Edward's* ability in that respect. The omission of the name of Lord *Edward Thynne* and his ability to charge, in the form of the question, and the putting forward the fund itself as the thing respecting which the inquiry was made, does not alter the case. The fund could not be charged but by the act of Lord *Edward Thynne*;—his ability to charge it is the thing substantially inquired into.

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It is contended by the counsel for the plaintiff, that this applies to cases where the personal security only of the borrower or customer is the subject of the inquiry, and is that that appears from the words of the statute. There no doubt that is the principal object, because the cases which occur are mostly cases of that description; but I find nothing in the act to limit it to cases of personal responsibility.

The words are general.

I think that the conclusion at which I have arrived is supported by the express words of the statute, and is conformable to its intention.

The construction which I have put upon the statute imposes no hardship on the party lending or trusting. He who has money to lend or goods to sell on credit, and doubts the ability of the borrower or the buyer, may exact his own terms: he may insist on having a representation or assurance in writing of the ability from a third person, and if that be refused, he may keep his money or his goods. If he thinks proper to trust without that, I think he has no right to resort to the responsibility of the person of whom he inquires.

A different construction would abridge the security which it was the object of this act to confer upon the per-

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sons of whom inquiries are made, and would, I fear, lead to the same consequences as the cases that I have mentioned produced with respect to the Statute of Frauds, until the legislature found it necessary to interpose.

I think, therefore, that this rule for setting aside the nonsuit should be discharged.

ALDERSON, B.—I regret that the difference of opinion existing in this case makes it necessary for me also to deliver the reasons for the judgment I have formed upon it. The question raised in this case depends on the construction to be put by the Court on the 6th section of *Lord Tenterden's Act*, 9 Geo. 4, c. 14.

That section provides, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, monies, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Now, the facts of the case seem to me to be in substance these:—the plaintiff *Lyde* was about to advance a sum of money to Lord *Edward Thynne* on the purchase of an annuity. The annuity was to be secured (in addition to his personal responsibility) by the assignment of Lord *Edward Thynne's* interest in a certain fund, settled at the time of his marriage, and of which the defendant, with some other persons, was a trustee.

This fund was charged at the time with three annuities, payable to Mr. *Mellish*, and was also liable to a mortgage of 20,000*l.*, then vested in the Marquis of *Bath*.

The defendant was applied to on the part of *Lyde* to inform him as to the existing state of, and charges upon, this fund; and the plaintiff contends that on that occasion

he wilfully and fraudulently made a false representation to him of the amount of the charges upon it. For this false representation the action was brought.

It appeared at the trial that the representation (if ever made at all) was at all events made by parol: whereupon the Lord Chief Baron on that ground directed a nonsuit.

According to the view I take of this case, I think the nonsuit was wrong, and that the facts ought to go to the jury.

The question is whether this was a representation concerning or relating to the ability of Lord *Edward Thynne*, so as to fall within Lord *Tenterden's* Act.

If we refer to the cases which had occurred before the legislative provision, I think it will be found that the decisions in that class of cases commencing with *Pasley v. Freeman*, had raised a well-founded complaint in the profession, as having in fact virtually repealed the Statute of Frauds, by which a guarantee was required to be in writing, and that the object Lord *Tenterden* had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle; for, a guarantee increases the ability of the third person who is about to be trusted, by adding to the value of his personal responsibility that of the person making the guarantee. And, in like manner, as the false and fraudulent representation as to the third person's ability equally adds, in the opinion of the person trusting to it, to the value of the third person's responsibility; it ought justly to have, and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantee of the third person's solvency.

I think, therefore, that we should take this as the key to the true construction of Lord *Tenterden's* Act, and if we do so, it seems to me to follow from it that a represen-

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tation, to be within the act, must be one by which the value of the personal responsibility of the third person is increased in the judgment of the individual from whom he is about to obtain credit, money, or goods; and this receives confirmation, I think, from the other words of the act.

The other representations are as to character, conduct, credit, trade, and dealings. All these look as if directed to general character for solvency, general conduct in pecuniary affairs, general credit on the *Exchange*, general mode of conducting trade or business.

The representation may no doubt, and most commonly will, be made as to particular incidents in character, conduct, and the like, but all these representations necessarily affect the general character, conduct, credit, trade and dealings, and consequently there can be no ambiguity or difficulty in construing the act in cases of this description. For, the third person's personal responsibility is necessarily involved in the result of such an inquiry and the answer to it—if money, goods, or credit be obtained in consequence thereof. But when we take the word *ability* (by which is of course meant pecuniary ability), the case becomes somewhat ambiguous. For, though a man's pecuniary ability depends on the value of the whole and of every part of his property; yet a representation confined wholly to the value of a particular portion of his property in possession, remainder, or expectation, may or may not relate to his pecuniary ability, and increase the value of his personal responsibility to the person making the inquiry, according to the circumstances under which it is made.

If the querist is about to trust to his intended debtor's personal responsibility, and the object of the question is to ascertain how far he will be safe in so doing, there can be no doubt that such a representation does relate to the third person's ability, and is within the act; but, if he be only about to take an assignment of the property itself, and

the object is to ascertain the value of that property, then it is, I think, as manifest that the pecuniary ability of the person about to assign has nothing to do with it. The party taking the assignment only looks to the property itself, and does not in that case trust the intended contractor at all. If we were to hold such a representation to be within the act, I do not see how we are to stop short of saying that all representations relating to contracts between third persons must be in writing, if such contracts relate to credit, or to the obtaining of money, or even to the sale or pledge of the goods. The assignment of a mortgage, or the sale of an estate, or the sale or pledge of any goods, would be within it, and a fraudulent and false representation of the value of or charges upon the estate mortgaged or sold, or the goods to be delivered or pledged, would be without danger if by parol. Indeed, the case of a party lending money on mortgage, who always has a double claim, first on the property mortgaged, secondly, on the personal responsibility of the mortgagor by express covenant, seems to me not easily distinguishable from the present. And consequently, a representation as to the value of the estate would be within the act, if this case be so. I do not say that it would not be a very good law if it were so, but I am not prepared to go so far in the construction of this act.

The concluding words of the section plainly, as it seems to me, point to the same construction. The representation must be, "to the intent that the third person may obtain credit, money, or goods upon;" which appear to me to shew that the object of the act was confined to cases in which the third person's responsibility is trusted.

According to the view which I take of the act, the representation, in order to be within it, must, therefore, be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, and must be one whereby, if true, that trustworthiness is in-

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creased. If indeed the real clause as drawn by Lord *Tenterden* stood thus, "To the intent that such third person might obtain money or goods upon credit," which is highly probable, this conclusion would be strengthened. But I do not rely on that which is, after all, only matter of probable conjecture from the ungrammatical state of the sentence as it now stands.

I proceed, then, to apply the above principles to the present case. Here the representation to the plaintiff is one which it is admitted relates solely to that portion of Lord *Edward Thynne's* property of which the plaintiff was about to take an absolute assignment. And I think the question put had reference only to that assignment.

The plaintiff did not, as it appears to me, apply to the defendant for any assurance as to Lord *Edward Thynne's* trustworthiness; all that he wished to know was the value of a particular fund about to be absolutely assigned to him; and, although the personal responsibility of Lord *Edward Thynne* was also to be taken, and therefore a representation as to the value of a portion of his property might, if unexplained, have reference to that also, yet I think the peculiar circumstances of this case, so far as it had gone when the nonsuit took place, negative that supposition here; and then, that this representation (if made at all by the defendant) was one relating solely to the value of the property to be assigned, and having no reference at all to the trustworthiness of Lord *Edward Thynne*, whose ability, according to the view I take of this Act of Parliament, would in this case depend not on the property assigned, but on the residue of his property alone, respecting which no inquiry was made. If, however, I am wrong in this view of the facts of the case, still I apprehend the nonsuit was wrong, and that there ought to be a new trial, in order that these facts may be submitted to the jury. For, if it be doubtful whether the question was put and the representation made solely with reference to the value of

the property to be assigned, or partly with reference to that and partly to the personal responsibility of Lord *Edward Thynne*, still the plaintiff ought not to have been nonsuited, but that doubtful question of fact should have been left to the jury with proper directions from the Lord Chief Baron.

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The case in principle falls within the rule established in actions for a malicious prosecution, where, although the question of probable cause is for the Judge, still, if the facts are disputed on which that question depends, the case as to that point must go to the jury with proper directions from the Judge. In this case, therefore, if the facts were doubtful, it seems to me that the Lord Chief Baron should have directed the jury, that if they thought this question was put, and the representation made *at all* with reference to the trustworthiness of Lord *Edward Thynne*, they ought at all events to find for the defendant, the representation not being in writing; but that, if they thought it had reference solely to the value of the property, then they should further consider whether it had been made fraudulently by the defendant.

For these reasons I think the nonsuit wrong.

PARKE, B.—The facts of this case having been already stated, it is useless to repeat them; but, in order to understand the question to be decided, it is necessary to observe, that, although the plaintiff intended to pay his money for the annuity, partly on the security of the transfer of Lord *Edward Thynne's* interest in the fund, and partly on his personal credit, the question to the defendant, and his representation in answer to it, related to *the fund only*, and in no way to the personal credit of the proposed grantor; for, the plaintiff's witness asked the question with a view that the plaintiff should take a transfer of all the interest of Lord *Edward*, and thus prevent it from being any longer a part of the means which constituted his personal

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credit; the plaintiff, in so far as he trusted to the personal credit of Lord *Edward*, looking to the other means which he might possess; and as the witness inquired as to the state of the fund only, and made no reference whatever to Lord *Edward Thynne's* general solvency, it must be understood, *primâ facie*, at least, that the defendant's representation was meant by him to relate to the state of the fund only, and not to that fund as an element of his personal credit. If any doubt could exist on this question, it should have been submitted to the jury.

The case, then, I consider to be precisely the same as if Lord *Edward Thynne's* personal credit was no way in question, and as if the only subject of inquiry and representation had been the state of the fund itself, or, which is the same thing, of some subject-matter which the inquirer was about to purchase; and we are to decide whether a representation concerning and relating to the qualities of a thing only, and not to the personal credit of a third person, be within the 9 *Geo. 4*, c. 14, s. 6. I am of opinion, after much consideration, that it is not. The clause is as follows: [The learned Baron here read the clause].

If we construe the first words of the clause according to their ordinary import, as we ought to do, it appears to me impossible to say, that a representation or assurance only as to the state of the property to be transferred to the inquirer in any way concerns or relates to the "character, credit, conduct, ability, trade, or dealings" of the person who is to transfer. It does not concern or relate to his *character*, nor to his *credit*; it does not relate to his *conduct, trade, or dealings*; for it is wholly immaterial, with reference to the inquiry and the answer to it, *who* had incumbered the fund: the only question in substance being, to what extent it was incumbered. And it does not concern or relate to his *ability*; for that word, especially when we look at those which accompany it, means in its ordinary sense some quality belonging to the third party,

and not to the thing to be transferred. In order to bring the particular case within the statute, this last word is relied upon; and it is said that the representation of the state of the fund relates to the "ability" of the intended grantor of the annuity; that is, to his "ability" to fulfil his contract to charge the fund; or, if no contract was made at the time of the representation, (as there was not), then the phrase must be changed, and it must be said to relate to his "ability" to charge the fund. But this will hardly be sufficient to answer the exigency of the case, for there is really no question as to the power of the third person to charge the fund, *such as it is*: it must therefore be said to relate to his "ability" to give security on a fund of *adequate* value. In like manner, I presume, if a fraudulent representation were made by one person to another, about to purchase an estate from a third, as to the rent paid for it, or its quality, as for instance, as to the existence of minerals under it, (which are cases, in my view of the subject, precisely analogous to this), such representation would be said to concern or relate to the "ability" of the vendor; that is, to his "ability" to convey an estate as valuable as the purchaser expected it to be when he made his purchase. In my apprehension this is a very forced construction of this word; and though the word is intelligible enough, when read with such contexts, I cannot help thinking that any one who found the word "ability," as it stands in this statute, would not *a priori* suppose that it could be so applied. I think, therefore, that, according to the ordinary meaning of this word, this representation in no way relates to the "ability" of the intended grantor of the annuity.

But I admit that words may be construed in a sense different from their ordinary one, when the context requires it, (which is not the case here), or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual.

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For we must always construe an act so as to suppress the mischief and advance the remedy.

We must therefore endeavour to ascertain what the mischief intended to be remedied was. The framer of the act has not enabled us to determine this by any *recital* in the section itself; and we are therefore left to infer it from our knowledge of the state of the law at the time, and of the practical grievances generally complained of.

It was stated at the bar, on both sides, and my learned Brothers who have preceded me agree, that the mischief to be remedied was the evasion of the provision of the Statute of Frauds, that no one could be charged with the debt, default, or miscarriage of another, unless there was a note in writing signed by the party to be charged therewith; and I concur in that opinion. Since the case of *Pasley v. Freeman*, it is well known, from some reported cases, and from others which have not found their way into the books, that a practice had grown up of fixing a person with the debt of another by parol evidence of a representation as to the solvency or trustworthiness of a third person, and proof that credit was given on the faith of that representation. The practice did not extend to *all* cases within the Statute of Frauds. That statute applies to a guarantee, for good consideration, for a debt *already contracted*, as well as where credit was to be given; but the evil existed only in those cases in which credit was subsequently given, on the faith of the representation made. In this respect the practice of bringing actions on such parol representations was an evasion of the Statute of Frauds; and Lord *Tenterden*, (who framed the act), I think, meant to put all cases on the same footing, where one, on the personal credit of another, gave personal credit to a third, and to make it necessary that there should be a note in writing where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mis-

chief to be this, and no more. It may be suggested that the legislature *might* have meant to put an end altogether to the liability of one person by a fraudulent parol representation, whereby another received all the benefit gained by that representation; but if such had been the intention of the framer of the act, I should have supposed he would have so drawn it as to include *all* cases of fraudulent representation, to the intent or purpose that another might obtain credit thereby, whereas he has certainly limited the prohibition to representations of character, credit, &c., which circumstances are those that naturally bear on the personal credit or trustworthiness of that third person, and indicate in my mind that the intention was to apply the enactment only to such cases wherein personal credit was intended to be given to another, and the representation relates to such personal credit, that is, to evasions of the Statute of Frauds.

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The words of the clause in question are, it is to be observed, clearly inaccurate, probably from a mistake in the transcriber into the Parliamentary roll. We must make an alteration in order to complete the sense, and must either transpose some words, and read the sentence as if it were "to the intent or purpose that some other person may obtain money or goods upon credit," or interpolate others, and read it as if it were "to the intent or purpose to obtain credit, money, or goods *on such representation.*" If we assume Lord *Tenterden's* object to have been merely to prevent evasions of the Statute of Frauds, as we think it was, and use this as a key for the construction of the clause, it would induce one to prefer the former alteration, by which the clause is made clearly to apply only to cases where the purpose of the representation is to obtain personal credit for the third person: but then, it would not apply to *all* cases of such credit, for it would include *money and goods* only, not work and labour done for the third person, or houses or land let to him, on the faith of such

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representation; which, however, are cases by no means of so frequent occurrence as transactions in money and goods. On the other hand, if we make the latter alteration, using the same key to the construction of the clause, we must reject the words "money or goods" as surplusage, as they would be included in the general term credit. I think it highly probable that the first correction would make the clause such as Lord *Tenterden* originally wrote it; but whichever is adopted, I am of opinion that the statute applies only to those cases in which the representation is made, relating to the trustworthiness of a third person, with the intent that he may obtain personal credit on the faith of such representation.

I do not by any means intend to say, that a representation as to the condition or value of a particular part of a man's property, may not relate to or concern his "character, credit, &c.," within the meaning of these words; it would do so where the declared object of the inquirer should be to give credit to a third person upon his personal responsibility, and he is seeking information as to part of the means which constitute its value; but where the representation is made as to the state of part of the property of such third person, not as an element of trustworthiness, but with a view that the inquirer should obtain a right to the thing itself, I am of opinion that such a representation in no way relates to or concerns the character, conduct, credit, "ability," trade, or dealings of that third person, within the meaning of this act.

For these reasons, I am of opinion that the rule ought to be made absolute.

Lord ABINGER, C. B.—This was a motion to set aside a nonsuit upon the statute of 9 *Geo.* 4, c. 14, s. 6. The action was brought upon an alleged false representation of the defendant that the marriage settlement of Lord *Edward Thynne* was only charged with three specific annui-

ties, whereas it was charged in addition with a mortgage for 20,000*l.* to his father, the Marquis of *Bath*; upon which representation the plaintiff was induced to advance to Lord *Edward* a sum of money upon an annuity secured by a charge upon the marriage settlement. Upon the objection urged at the trial, that the representation, not being made in writing, could not by virtue of the statute be the ground of an action, the plaintiff was nonsuited; since which the question has been fully discussed upon a motion to set the nonsuit aside, and the Court has taken some time to consider of the judgment which ought to be given. And I am of opinion that the rule for setting aside the nonsuit should be discharged.

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The statute of 9 *Geo.* 4, c. 14, commonly called Lord *Tenterden's* act, was introduced to supply a defect which had been found by experience to exist in the 29 *Car.* 2, c. 3, s. 4, the material part of which, as it applies to this case, is in these words—"That no action shall be brought whereby to charge the defendant upon any *special promise* to answer for the debt, default, or miscarriage of another person, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorized." The obvious policy of this statute was to prevent that fraud and perjury which had been found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable. This statute clearly extends to promises to answer for the debt, default, or miscarriage of another, whether that debt is secured by mortgage or other specific pledge, or the default or miscarriage arises from the failure of a specific security.

This statute seems to have successfully accomplished

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its object, till a mode was discovered of evading it, by shaping the demand, not upon a *special promise*, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false or fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was that of *Pasley v. Freeman* (a). In that case Mr. Justice *Grose* differed from the other Judges; he treated it as a case entirely new, for which there was no precedent, and as a means of evading the Statute of Frauds so obvious, that he predicted an abundant succession of actions of the same sort as the result of that determination. The other Judges, Lord *Kenyon*, Mr. Justice *Ashhurst*, and Mr. Justice *Buller*, admitted that there was no precedent for such an action, but thought there were principles to be found in the law to support it; and Lord *Kenyon* in particular, with that high tone of moral feeling which ever distinguished his judgments, pronounced that the law would have been very defective if it had not given a remedy for an injury resulting from a gross breach of the plainest rules of morality. Whatever may have been the merit of this decision, it is certain that the prediction of Mr. Justice *Grose* has been fully accomplished. The case of *Pasley v. Freeman* has been the foundation of a numerous class of cases of the like kind, some few of which only have found their way into the printed reports, the great majority having passed without further notice after the struggle for the verdict ceased. It was to remedy the inconvenience resulting from the frequency of those actions that Lord *Tenterden* introduced the statute 9 *Geo. 4*, c. 16, s. 6, which is in these words: "And be it further enacted, that no action shall be brought whereby to charge any person by reason of any representation or assurance made or given concerning or relating to the

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character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, credit, or goods *upon*, unless such representation or assurance be made in writing, signed by the party to be charged therewith.”

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It has been contended, that the case now before us does not fall within the proper construction of this statute, because it is the case of a false representation of a particular fact; that it was not a representation concerning the general ability of Lord *Edward Thynne*, or made with an intention that credit, or money, or goods should be obtained, upon the belief of his general ability; and that the statute ought, by construction, to be confined to cases where the representation concerns the general ability, or where the party to whom it is made proposes only to rely on the general ability, or personal security or promise, of the person to be trusted.

It is true that the question raised turns upon the meaning of the word *ability* in the act. The first objection pre-supposes that the word *general* ought to be implied before the word *ability*, in order to give to the whole clause the sense contended for. Now, it seems to me to be contrary to the first principles which ought to govern the construction of a remedial statute, to introduce words by implication for the purpose of narrowing the remedy, and thereby excluding a particular class of cases that are obviously within the mischief. For if this construction should prevail, the mischief apprehended by Mr. Justice *Grose*, and verified by experience, will be met by a very inadequate remedy, as it will be found very easy to make such actions turn upon representations and assurances, that are collateral to the general ability of a third person. Such, for instance, as the representation of the value of a particular estate, either in land or goods; of the power to charge it; of the soundness of the title; of the expectations of the party, or his right or well-grounded hope of

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a legacy, succession, inheritance, or office. The inquiry of the party seeking information will be ingeniously directed to some specific object or circumstance from which the ability of the party to perform the engagement upon which he is trusted with money may be inferred, and thus a plentiful crop of actions will be left behind, whereby, upon verbal representations alone, a defendant may be charged with the debt, default, or miscarriage of another. As in the present case, it is plain that the defendant is sought to be charged for the debt, default, and miscarriage of Lord *Edward Thynne*, in the non-payment of the annuity which he contracted to pay. And I cannot very well see the policy of requiring a written representation of the general ability of Lord *Edward Thynne* to pay an annuity by means of his general pecuniary resources, and at the same time of excluding the necessity of a written representation of his ability to pay it out of or by means of a particular unfettered fund. The one and the other are equally susceptible of misapprehension, of uncertainty, of distortion, of misconstruction, or of being invented by fraud and supported by perjury.

But after all, what does the general ability or substance of a man consist in, but in one or more particular sources from whence it is derived? He may have a landed estate unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his banker's hands. Upon all or any one of these his general ability may depend. Can it be said, that a representation of any one of these sources of ability has no relation to his *general* ability? Suppose that in the case now before us, the inquiry had been in the strictest sense concerning the general ability of Lord *Edward Thynne*, and the answer had been in these words: "I know nothing of his circumstances, but that he is entitled by his marriage settlement to the dividends for his life of a sum of forty-

three thousand pounds, which are invested in the funds, and that at least one-half of these dividends are unfettered by any charge upon them." Could this answer be said to have no relation to the question? Would it not be in effect an answer from which the party inquiring might imply the general ability of Lord *Edward Thynne* to a certain extent? Would it not be a resource entitling him to credit, that he should have the *ability* to charge this fund for his life, to the amount of half the dividends? Can it be denied that it forms a part of a man's general ability that he is able, by specific means, to give sufficient security to pay the money he borrows, or to comply with any other pecuniary engagements into which he enters? The objection is more specious in the second form, namely, that in this case the plaintiff never meant to rely on the ability of Lord *Edward*, or upon his character, conduct, credit, trade, or dealings, but upon a specific security, respecting which alone his inquiries were directed, and that the statement does not extend to a false representation of the value of any specific property. This objection, however, appears to me to be founded on a fallacy. In fact, the plaintiff meant to rely on the ability of Lord *Edward Thynne* to give him an efficient security to repay him, by way of a life annuity, the money he advanced. It was to ascertain this ability that he made the inquiry, and it was upon the alleged faith he put in the answer that he advanced the money. That answer was, in the very words of the statute, a representation relating to the ability of Lord *Edward Thynne*, made to the intent that he might obtain money from the plaintiff. Can it make any difference, in reason or policy, or the mischief to be remedied, that the party lending the money or furnishing the goods intends to take a specific security? Is the ability to give an efficient security the less a part of the ability of the party, because the person inquiring means to take such security? Can the intention of the inquirer alter the relation of the answer to the ability of

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the party? According to this objection, an inquiry whether a party wishing to borrow money has an estate in land of 5000*l.* a-year, or 100,000*l.* free of all incumbrances, or a large investment in goods addressed to foreign markets, upon which he may assign the bill of lading, would not be an inquiry respecting his ability, if the object of the inquirer were to obtain a specific security for money lent; but if the object were to lend money on his personal credit only, then the inquiry would relate to his ability, and, consequently, the answer to such an inquiry would or would not *concern or relate to the ability of the party* wanting the money, according to the intention of the party making the inquiry. The statement of such a conclusion as the necessary consequence of the argument, is in effect a sufficient refutation of it. The statute says nothing of the object of the party making the inquiry, nor indeed of the inquiry itself. It speaks only of a representation or assurance concerning or relating to the ability of any other person, to the intent or purpose that such other person should obtain money, goods, or credit. And it seems to me, that there is no necessity which compels us, nor advantage to be gained that should induce us, to mix up with these plain words, or to qualify them by, any reference to the object of the party to whom the representation is made, of taking security upon any specific fund for the money or goods obtained from him. The author of this statute appears to have had the Statute of Frauds before him. Some of his words are adopted from that statute, and where he has repudiated the words before him and adopted others, he seems to have done so with a view not to narrow, but to extend his remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation and assurance the party making it intended that other person to obtain

money, goods, or credit. Now, it is plain that the remedy proposed by the Statute of Frauds extended to a promise to pay any debt, or answer for any default of another, whether that debt was secured by mortgage or not, or whether specific security was taken or not against that default; whereas, by the construction now contended for, though a promise to pay a debt of another, secured by mortgage, is within the Statute of Frauds, yet a false representation of the value of the property is not within Lord *Tenterden's* act; nor can any representation of the value of specific property be determined to be within the act, till the party to whom it is made shall have finally concluded, whether he will take a specific security or rely on the personal credit of the party who is represented to be able to give that security. It seems to me, therefore, that the true construction of the statute is, that the representation or assurance should concern or relate to the *ability* of the other person, *effectually to perform and satisfy the engagement of a pecuniary nature, into which he has proposed to enter*, and upon the faith of which he is to obtain money, credit, or goods. And as the representation in this case was clearly one of that nature, I think it was within both the words and spirit of the statute.

With regard to the remarks which have been made upon the introduction into the statute of the word *upon*, without any grammatical relation to the other words of the sentence, I must observe, that I am decidedly of opinion that this word must be rejected as nonsensical, and that we cannot admit a conjectural transposition of it in order to interpret the statute. Neither do I think that either of the conjectures offered gives the most probable account for the introduction of the word. The manuscript of this clause most probably contained the word *thereupon*; on revising it, the author considered that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow the construction. He has

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therefore meant to strike it out, but has not carried his erasure with sufficient force through the latter part of the word. The word *upon* has, therefore, found its way into the print, and has escaped notice afterwards when the bill was in committee. The printers of bills for the two houses seldom commit an error on the side of omission. Every thing which is not beyond doubt erased in MS. is sure to be served up in print, and, if it should afterwards escape detection in committee, finds its way upon the rolls of Parliament, and into the Statute Book.

Lord ABINGER, C. B., then said—The Court being equally divided in opinion, the effect would be that the rule would be discharged; but the question being one of much importance, the Court are disposed to allow the defendant to have a new trial on payment of costs, in order that he may have an opportunity of raising the question on the record, for the opinion of a Court of Error.

Rule accordingly.

THOMAS v. SHILLIBEER and MORTON.

Assumpsit
against two de-
fendants, S. and
M., for money

ASSUMPSIT for money had and received, and on an account stated.—The defendant *Morton* suffered judg-

had and received. *Plea*, as to 25*l.*, parcel &c., that on &c., the defendants were carrying on business in partnership, and employing many servants; that while they were such partners, the plaintiff deposited with them, as such partners, the said sum of 25*l.*, as a security for his faithfully accounting for all monies received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, and it was thereupon agreed between them that the defendant *S.* should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant *M.* should take upon himself the payment of other debts, and retain in his employ others of the servants; and that, in pursuance of such agreement, *M.* took upon himself the payment of the 25*l.* to the plaintiff, and retained the plaintiff in his sole employ; that the plaintiff had notice of all the premises, and assented to such agreement and retainer by *M.*, and in consideration thereof discharged *S.* from his promise as to the 25*l.*

Replication, that *M.* did not retain the plaintiff in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c., and issue thereon.

After verdict for the defendant on this issue—*Held*, that the plaintiff was entitled to judgment *non obstante veredicto*, on the ground that no contract was shewn which made *M.* solely liable to the plaintiff.

ment by default. The defendant *Shillibeer* pleaded, *first*, except as to the sum of 25*l.*, parcel of the several sums of money in the declaration mentioned, *non assumpsit*; *secondly*, as to the said sum of 25*l.*, parcel &c., *actionem non*, because, he says, that on the 13th *January*, 1833, the said defendants were carrying on together, in partnership, the business of omnibus proprietors, and were employing therein very many servants and agents; and that whilst they were such partners as aforesaid, to wit, on &c., the plaintiff deposited with the defendants, as such partners as aforesaid, the said sum of 25*l.*, parcel &c., as security for the plaintiff's faithfully accounting for all monies received by him as their servant, to wit, as their conductor, to be repaid to the plaintiff on his quitting their employ: that afterwards, to wit, on the 9th *January*, 1834, the said partnership was duly dissolved by mutual consent, and upon the occasion of the said dissolution it was agreed by and between the defendants that the defendant *Shillibeer* should take upon himself the payment of a certain part of the debts due from the defendants as such partners as aforesaid, and should retain in his sole employ certain of the said servants then lately employed by the defendants in their joint business as aforesaid, and that the said defendant *Morton* should take upon himself the payment of a certain other part of the said debts, and should retain in his sole employ certain other of the said servants: and the said *Morton*, in pursuance of the said agreement, then took upon himself the payment to the plaintiff of the said sum of 25*l.*, parcel &c., so deposited by the plaintiff with the defendants as aforesaid, and then retained the plaintiff in his sole employ and service: and the said defendant *Shillibeer* avers that the plaintiff had notice of all the premises, to wit, on the day and year last aforesaid, and then assented to the said last-mentioned agreement, and to the said undertaking and retainer of the said defendant *Morton*, and, in consideration of the premises respectively, the

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plaintiff then wholly discharged the defendant *Shillibeer* from his said promise, so far as it relates to the said sum of 25*l.*, parcel &c.—Verification.

Replication to the latter plea—That *Morton* did not retain the plaintiff in his sole employ, nor had the plaintiff notice of all the premises, nor did he assent to the said last-mentioned agreement, undertaking, and retainer of *Morton*, or discharge the defendant *Shillibeer* from his said promise so far as it relates to the said sum of 25*l.*, parcel &c.; concluding to the country: and issue thereon.

At the trial before *Bolland*, B., at the Sittings at *Westminster*, the agreement and retainer by *Morton*, as stated in the plea, being proved, the defendant had a verdict on the second issue. In *Michaelmas* Term, *Crowder* obtained a rule to shew cause why judgment should not be entered for the plaintiff *non obstante veredicto*, on the ground that the second plea was bad in substance, for not alleging that *Morton* promised the plaintiff to pay him the 25*l.*; citing *Price v. Easton* (a).

Barstow now shewed cause.—The plea is a sufficient answer to the action, inasmuch as it shews that *Shillibeer* is discharged from the joint contract with the plaintiff, and that the plaintiff has taken *Morton* as his debtor. The strictness of the rule as to the transfer of debts on a dissolution of partnership, which was laid down in *David v. Ellice* (b), has been much relaxed; *Thompson v. Percival* (c). [*Parke*, B.—The difficulty here is to find matter in the plea to shew that an action could be maintained by the plaintiff against *Morton* alone, without his having a right to plead in abatement the non-joinder of *Shillibeer*.] It is submitted that *Shillibeer* is entirely discharged, and that a count could be framed against *Morton*, to which he could not plead the non-joinder. It is true there is no ex-

(a) 4 B. & Ad. 433; 1 Nev. & M. 303.

(c) 3 Nev. & M. 167; 5 B. & Adol. 925.

(b) 7 D. & R. 690; 5 B. & C. 196.

ties, whereas it was charged in addition with a mortgage for 20,000*l.* to his father, the Marquis of *Bath*; upon which representation the plaintiff was induced to advance to Lord *Edward* a sum of money upon an annuity secured by a charge upon the marriage settlement. Upon the objection urged at the trial, that the representation, not being made in writing, could not by virtue of the statute be the ground of an action, the plaintiff was nonsuited; since which the question has been fully discussed upon a motion to set the nonsuit aside, and the Court has taken some time to consider of the judgment which ought to be given. And I am of opinion that the rule for setting aside the nonsuit should be discharged.

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The statute of 9 *Geo.* 4, c. 14, commonly called Lord *Tenterden's* act, was introduced to supply a defect which had been found by experience to exist in the 29 *Car.* 2, c. 3, s. 4, the material part of which, as it applies to this case, is in these words—"That no action shall be brought whereby to charge the defendant upon any *special promise* to answer for the debt, default, or miscarriage of another person, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorized." The obvious policy of this statute was to prevent that fraud and perjury which had been found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable. This statute clearly extends to promises to answer for the debt, default, or miscarriage of another, whether that debt is secured by mortgage or other specific pledge, or the default or miscarriage arises from the failure of a specific security.

This statute seems to have successfully accomplished

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its object, till a mode was discovered of evading it, by shaping the demand, not upon a *special promise*, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false or fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was that of *Pasley v. Freeman* (a). In that case Mr. Justice Grose differed from the other Judges; he treated it as a case entirely new, for which there was no precedent, and as a means of evading the Statute of Frauds so obvious, that he predicted an abundant succession of actions of the same sort as the result of that determination. The other Judges, Lord Kenyon, Mr. Justice Ashhurst, and Mr. Justice Buller, admitted that there was no precedent for such an action, but thought there were principles to be found in the law to support it; and Lord Kenyon in particular, with that high tone of moral feeling which ever distinguished his judgments, pronounced that the law would have been very defective if it had not given a remedy for an injury resulting from a gross breach of the plainest rules of morality. Whatever may have been the merit of this decision, it is certain that the prediction of Mr. Justice Grose has been fully accomplished. The case of *Pasley v. Freeman* has been the foundation of a numerous class of cases of the like kind, some few of which only have found their way into the printed reports, the great majority having passed without further notice after the struggle for the verdict ceased. It was to remedy the inconvenience resulting from the frequency of those actions that Lord Tenterden introduced the statute 9 Geo. 4, c. 16, s. 6, which is in these words: "And be it further enacted, that no action shall be brought whereby to charge any person by reason of any representation or assurance made or given concerning or relating to the

(a) 3 T. R. 51.

character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, credit, or goods *upon*, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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It has been contended, that the case now before us does not fall within the proper construction of this statute, because it is the case of a false representation of a particular fact; that it was not a representation concerning the general ability of Lord *Edward Thynne*, or made with an intention that credit, or money, or goods should be obtained, upon the belief of his general ability; and that the statute ought, by construction, to be confined to cases where the representation concerns the general ability, or where the party to whom it is made proposes only to rely on the general ability, or personal security or promise, of the person to be trusted.

It is true that the question raised turns upon the meaning of the word *ability* in the act. The first objection pre-supposes that the word *general* ought to be implied before the word *ability*, in order to give to the whole clause the sense contended for. Now, it seems to me to be contrary to the first principles which ought to govern the construction of a remedial statute, to introduce words by implication for the purpose of narrowing the remedy, and thereby excluding a particular class of cases that are obviously within the mischief. For if this construction should prevail, the mischief apprehended by Mr. Justice *Grose*, and verified by experience, will be met by a very inadequate remedy, as it will be found very easy to make such actions turn upon representations and assurances, that are collateral to the general ability of a third person. Such, for instance, as the representation of the value of a particular estate, either in land or goods; of the power to charge it; of the soundness of the title; of the expectations of the party, or his right or well-grounded hope of

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a legacy, succession, inheritance, or office. The inquiry of the party seeking information will be ingeniously directed to some specific object or circumstance from which the ability of the party to perform the engagement upon which he is trusted with money may be inferred, and thus a plentiful crop of actions will be left behind, whereby, upon verbal representations alone, a defendant may be charged with the debt, default, or miscarriage of another. As in the present case, it is plain that the defendant is sought to be charged for the debt, default, and miscarriage of Lord *Edward Thynne*, in the non-payment of the annuity which he contracted to pay. And I cannot very well see the policy of requiring a written representation of the general ability of Lord *Edward Thynne* to pay an annuity by means of his general pecuniary resources, and at the same time of excluding the necessity of a written representation of his ability to pay it out of or by means of a particular unfettered fund. The one and the other are equally susceptible of misapprehension, of uncertainty, of distortion, of misconstruction, or of being invented by fraud and supported by perjury.

But after all, what does the general ability or substance of a man consist in, but in one or more particular sources from whence it is derived? He may have a landed estate unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his banker's hands. Upon all or any one of these his general ability may depend. Can it be said, that a representation of any one of these sources of ability has no relation to his *general* ability? Suppose that in the case now before us, the inquiry had been in the strictest sense concerning the general ability of Lord *Edward Thynne*, and the answer had been in these words: "I know nothing of his circumstances, but that he is entitled by his marriage settlement to the dividends for his life of a sum of forty-

three thousand pounds, which are invested in the funds, and that at least one-half of these dividends are unfettered by any charge upon them." Could this answer be said to have no relation to the question? Would it not be in effect an answer from which the party inquiring might imply the general ability of Lord *Edward Thynne* to a certain extent? Would it not be a resource entitling him to credit, that he should have the *ability* to charge this fund for his life, to the amount of half the dividends? Can it be denied that it forms a part of a man's general ability that he is able, by specific means, to give sufficient security to pay the money he borrows, or to comply with any other pecuniary engagements into which he enters? The objection is more specious in the second form, namely, that in this case the plaintiff never meant to rely on the ability of Lord *Edward*, or upon his character, conduct, credit, trade, or dealings, but upon a specific security, respecting which alone his inquiries were directed, and that the statement does not extend to a false representation of the value of any specific property. This objection, however, appears to me to be founded on a fallacy. In fact, the plaintiff meant to rely on the ability of Lord *Edward Thynne* to give him an efficient security to repay him, by way of a life annuity, the money he advanced. It was to ascertain this ability that he made the inquiry, and it was upon the alleged faith he put in the answer that he advanced the money. That answer was, in the very words of the statute, a representation relating to the ability of Lord *Edward Thynne*, made to the intent that he might obtain money from the plaintiff. Can it make any difference, in reason or policy, or the mischief to be remedied, that the party lending the money or furnishing the goods intends to take a specific security? Is the ability to give an efficient security the less a part of the ability of the party, because the person inquiring means to take such security? Can the intention of the inquirer alter the relation of the answer to the ability of

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the party according to this objection, an inquiry whether a party wishing to borrow money has an estate in land of 5000*l.* a year, or 100,000*l.* free of all incumbrances, or a large investment in goods addressed to foreign markets, upon which he may assign the bill of lading, would not be an inquiry respecting his ability, if the object of the inquiry were to obtain a specific security for money lent: but if the object were to lend money on his personal credit only, then the inquiry would relate to his ability, and, consequently, the answer to such an inquiry would or would not concern *or relate to the ability of the party wanting the money*, according to the intention of the party making the inquiry. The statement of such a conclusion is the necessary consequence of the argument, is in effect a sufficient restriction of it. The statute says nothing of the object of the party making the inquiry, nor indeed of the inquiry itself. It speaks only of a representation or assurance concerning or relating to the ability of any other person, to the intent or purpose that such other person should obtain money, goods, or credit. And it seems to me, that there is no necessity which compels us, for advantage to be gained that should induce us, to mix up with these plain words, or to qualify them by, any reference to the object of the party to whom the representation is made, of taking security upon any specific fund for the money or goods obtained from him. The author of this statute appears to have had the Statute of Frauds before him. Some of his words are adopted from that statute, and where he has repudiated the words before him and adopted others, he seems to have done so with a view not to narrow, but to extend his remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation and assurance the party making it intended that other person to obtain

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With regard to the remarks which have been made upon the introduction into the statute of the word *upon*, without any grammatical relation to the other words of the sentence, I must observe, that I am decidedly of opinion that this word must be rejected as nonsensical, and that we cannot admit a conjectural transposition of it in order to interpret the statute. Neither do I think that either of the conjectures offered gives the most probable account for the introduction of the word. The manuscript of this clause most probably contained the word *thereupon*; on revising it, the author considered that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow the construction. He has

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Lord ABINGER, C. B., then said—The Court being equally divided in opinion, the effect would be that the rule would be discharged; but the question being one of much importance, the Court are disposed to allow the defendant to have a new trial on payment of costs, in order that he may have an opportunity of raising the question on the record, for the opinion of a Court of Error.

Rule accordingly.

THOMAS v. SHILLIBEER and MORTON.

Assumpsit
against two de-
fendants, S. and
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ASSUMPSIT for money had and received, and on an account stated.—The defendant *Morton* suffered judg-

had and received. *Plea*, as to 25*l.*, parcel &c., that on &c., the defendants were carrying on business in partnership, and employing many servants; that while they were such partners, the plaintiff deposited with them, as such partners, the said sum of 25*l.*, as a security for his faithfully accounting for all monies received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, and it was thereupon agreed between them that the defendant *S.* should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant *M.* should take upon himself the payment of other debts, and retain in his employ others of the servants; and that, in pursuance of such agreement, *M.* took upon himself the payment of the 25*l.* to the plaintiff, and retained the plaintiff in his sole employ; that the plaintiff had notice of all the premises, and assented to such agreement and retainer by *M.*, and in consideration thereof discharged *S.* from his promise as to the 25*l.*

Replication, that *M.* did not retain the plaintiff in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c., and issue thereon.

After verdict for the defendant on this issue—*Held*, that the plaintiff was entitled to judgment *non obstante verdicto*, on the ground that no contract was shewn which made *M.* solely liable to the plaintiff.

ment by default. The defendant *Shillibeer* pleaded, *first*, except as to the sum of 25*l.*, parcel of the several sums of money in the declaration mentioned, *non assumpsit*; *secondly*, as to the said sum of 25*l.*, parcel &c., *actionem non*, because, he says, that on the 13th *January*, 1833, the said defendants were carrying on together, in partnership, the business of omnibus proprietors, and were employing therein very many servants and agents; and that whilst they were such partners as aforesaid, to wit, on &c., the plaintiff deposited with the defendants, as such partners as aforesaid, the said sum of 25*l.*, parcel &c., as security for the plaintiff's faithfully accounting for all monies received by him as their servant, to wit, as their conductor, to be repaid to the plaintiff on his quitting their employ: that afterwards, to wit, on the 9th *January*, 1834, the said partnership was duly dissolved by mutual consent, and upon the occasion of the said dissolution it was agreed by and between the defendants that the defendant *Shillibeer* should take upon himself the payment of a certain part of the debts due from the defendants as such partners as aforesaid, and should retain in his sole employ certain of the said servants then lately employed by the defendants in their joint business as aforesaid, and that the said defendant *Morton* should take upon himself the payment of a certain other part of the said debts, and should retain in his sole employ certain other of the said servants: and the said *Morton*, in pursuance of the said agreement, then took upon himself the payment to the plaintiff of the said sum of 25*l.*, parcel &c., so deposited by the plaintiff with the defendants as aforesaid, and then retained the plaintiff in his sole employ and service: and the said defendant *Shillibeer* avers that the plaintiff had notice of all the premises, to wit, on the day and year last aforesaid, and then assented to the said last-mentioned agreement, and to the said undertaking and retainer of the said defendant *Morton*, and, in consideration of the premises respectively, the

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plaintiff then wholly discharged the defendant *Shillibee* from his said promise, so far as it relates to the said sum of 25*l.*, parcel &c.—Verification.

Replication to the latter plea—That *Morton* did not retain the plaintiff in his sole employ, nor had the plaintiff notice of all the premises, nor did he assent to the said last-mentioned agreement, undertaking, and retainer of *Morton*, or discharge the defendant *Shillibee* from his said promise so far as it relates to the said sum of 25*l.*, parcel &c.; concluding to the country: and issue thereon.

At the trial before *Bollard*, B., at the Sittings at *Westminster*, the agreement and retainer by *Morton*, as stated in the plea, being proved, the defendant had a verdict on the second issue. In *Michaemas* Term, *Crowder* obtained a rule to shew cause why judgment should not be entered for the plaintiff *non obstante veredicto*, on the ground that the second plea was bad in substance, for not alleging that *Morton* promised the plaintiff to pay him the 25*l.*; citing *Price v. Easton* (a).

Barstow now shewed cause.—The plea is a sufficient answer to the action, inasmuch as it shews that *Shillibee* is discharged from the joint contract with the plaintiff, and that the plaintiff has taken *Morton* as his debtor. The strictness of the rule as to the transfer of debts on a dissolution of partnership, which was laid down in *David v. Ellice* (b), has been much relaxed; *Thompson v. Percival* (c). [*Parke*, B.—The difficulty here is to find matter in the plea to shew that an action could be maintained by the plaintiff against *Morton* alone, without his having a right to plead in abatement the non-joinder of *Shillibee*.] It is submitted that *Shillibee* is entirely discharged, and that a count could be framed against *Morton*, to which he could not plead the non-joinder. It is true there is no ex-

(a) 4 B. & Ad. 433; 1 Nev. & M. 303.

(c) 3 Nev. & M. 167; 5 B. & Adol. 925.

(b) 7 D. & R. 690; 5 B. & C. 196.

press allegation that *Morton* promised the plaintiff to pay him; but it is in substance the same, if a number of facts be stated, the combination of which shews irresistibly that a sufficient cause of action has been created against *Morton* alone. After verdict, nothing more is necessary than the statement of such facts, as, being stated by witnesses at *Nisi Prius*, would be sufficient to shew a right to recover against *Morton*. The legal promise to pay is no more than the result of those facts. In an action for money lent, an admission that the money was borrowed is sufficient to entitle the plaintiff to recover; he need not prove a promise to pay, which is the necessary implication of law. [*Alderson*, B.—Must not the declaration in such case aver that the defendant promised? Lord *Abinger*, C. B.—You must not plead evidence.] The legal meaning of the agreement stated in the plea is an agreement by *Morton* to pay the plaintiff. [*Parke*, B.—It must be an agreement *with* the plaintiff. Lord *Abinger*, C. B.—It is a very different thing whether the plaintiff made no objection to an agreement to which he was not a party, and whether an agreement was made *with him*, whereby, in consideration of his releasing one partner, the other undertook to pay the debt.] It is submitted that these facts would prove a count on such an agreement. They amount to this, that both parties come to the plaintiff, and state an arrangement between them, and he assents to it. [*Parke*, B.—The difficulty is, you have not got them all together on the face of your plea. But there may be a question, whether the latter part of the plea, which states the retainer of the plaintiff by, and his service with, *Morton*, is not sufficient to support the verdict. The discharge of *Shillibeer* is alleged to be “in consideration of the premises respectively:” if some of the premises furnish an adequate consideration, that is sufficient.] The retainer and service do furnish an adequate consideration. There is a benefit to the plaintiff in being continued in the employment; and in consequence of the agreement, the concern is kept on foot

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for the benefit of the servants, when it might have been broken up altogether. [Lord *Abinger*, C. B.—The discharge of *Shillibeer* is a discharge from a *joint* promise; that is a discharge of both; then have you shewn that in consequence of that discharge the plaintiff had a remedy against any body else? because you have not shewn any promise by *Morton*.] It is submitted that on this record judgment might be given against *Morton* alone; the joint contract being discharged, and a new one created against him alone. But the agreement as to the retainer is sufficient without introducing *Morton* into it at all.

Crowder, in support of the rule.—The only real question on the plea is, whether there is any contract between *Morton* and the plaintiff. If the retainer is a sufficient consideration, the discharge of *Shillibeer* would be equally a discharge of *Morton*. But the whole plea goes upon the supposition that the original debt is subsisting, only that it is transferred to *Morton*. The argument would go to this; that a plea alleging a *transfer* of a debt might amount to a *discharge* of it altogether. The defendant never intended to allege any consideration moving to a *release* of the debt. The retainer of the plaintiff is only a retainer by *Morton*; the plaintiff was before the servant of both; what benefit is it to him to remain in the service of one of them? The defendant has not stated any discharge from the joint service.

LORD ABINGER, C. B.—It does not appear on the face of the plea, that the two were not under an obligation to keep the plaintiff in their service, or that, upon the dissolution, the defendant *Morton* came under any obligation which would prevent his discharging the plaintiff at any time.

PARKE, B.—That disposes of all the consideration, and there is no agreement at all which makes *Morton* solely liable to the plaintiff. The rule must be absolute.

ALDERSON, B.—The case comes to this, that you must construe the discharge stated in the plea to be a discharge of *both* the defendants, though the plea treats it throughout as only a discharge of one.

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Rule absolute.

LANG v. SPICER.

TRESPASS for assault and false imprisonment.—Plea, not guilty. By consent of the parties, the following case was, under the order of *Gurney, B.*, stated for the opinion of this Court.

The plaintiff is, and at the time of the alleged assault and imprisonment was, living in the parish of *Portsea*, within the borough of *Portsmouth*, in the county of *Southampton*. The defendant is, and was at that time, one of His Majesty's Justices of the Peace in and for the said borough. On the 7th day of *August*, 1832, *Edward Carter* and *William Cooper*, Esquires, two of His Majesty's Justices of the Peace in and for the borough of *Portsmouth*, made an order of filiation against the plaintiff concerning a male bastard child, then lately born in the parish aforesaid of the body of one *Mary Ann Chalton*, single woman, whereby the said last-mentioned justices did adjudge the said plaintiff to be the reputed father of the said bastard child; and thereupon they did order, as well for the better relief of the said parish of *Portsea*, as for the sustentation and relief of the said bastard child, that the said plaintiff should pay or cause to be paid to the churchwardens and overseers of the poor of the said parish of *Portsea* for the time being, or to some or one of them, the sum of 2*s.* weekly and every week from the then present time, for and towards the keeping, sustentation, and maintenance of the said bastard child, for and during so long time as the bastard child should be chargeable to the said parish of *Portsea*. And they did

By the 4 & 5
Will. 4, c. 76, s. 57, the putative father of a bastard child born before the passing of the act, whose mother is married to another person, is no longer liable on an order of justices for the maintenance of such child; at least while the husband is of ability to maintain it.

Semble, the 4 & 5 *Will. 4*, c. 76, s. 57, operated as a repeal of the 18 *Eliz.* c. 3, s. 2, and 49 *Geo. 3*, c. 68.

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further order, that the said *Mary Ann Chalton* should also pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of *Portsea* for the time being, or to some or one of them, the sum of 6*d.* weekly and every week, so long as the said bastard child should be chargeable to the said parish of *Portsea*, in case she should not nurse and take care of the said child herself.

On the 10th day of *November*, 1834, *Mary Ann Chalton* was lawfully married to one *Joseph Toe*, who is still living. The said child was, at the date of the warrant hereinafter mentioned, about the age of three years, and has been living with its mother and the said *Joseph Toe* since the said marriage.

In obedience to the said order, the plaintiff paid weekly and every week, the said sum of 2*s.* so ordered to be paid by him as aforesaid, until the 1st day of *March*, 1835, when he refused and ceased to make any further payment in obedience thereto.

The said child was chargeable to the said parish up to the time of the said marriage, and after the said marriage still continued so chargeable up to the date of the warrant hereinafter mentioned, and was supported by the officers of the parish from the payments so made by the said plaintiff as long as they were so made as aforesaid; and after the said plaintiff discontinued the said payments, the said child was supported by the said officers from the stock and at the expense of the said parish. The means of livelihood of the said husband and *Mary Ann* were at that time 15*s.* a-week, which he received as wages for labour, his family then being himself, his said wife *Mary Ann*, and one child, aged two years.

Some weeks after the said plaintiff had discontinued his payments, the said parish officers informed the said defendant, so being such justice, of the above circumstances, whereupon the defendant issued his summons to the plaintiff to appear before him and answer. The said

plaintiff appeared thereupon, and shewed cause before the said defendant why he should not make any further payments, and refused to make any further payments in obedience to the said order. The defendant considered the cause so shewn to be insufficient, and thereupon convicted the plaintiff; and by warrant, dated the 3rd day of *September*, 1835, committed him to prison, in which he remained a short time, when he paid what was required, and was discharged.

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The action is brought in respect of that imprisonment. No question is raised regarding the said order, or any of the proceedings before the said justices, in point of form, nor regarding the sufficiency of the plaintiff's notice to the defendant of this action. All were duly made according to the several statutes in such case respectively provided.

The question for the opinion of the Court is—

Whether, under the above-mentioned circumstances, the liability of the plaintiff to make any further payments in obedience to the said order, after the said marriage, was suspended or removed by the statute of the 4th and 5th *Will.* 4, c. 76, and particularly by the 57th section of that statute. If the Court shall be of opinion that his liability was not suspended nor removed, then the plaintiff agrees that a judgment shall and may be entered against him of *nolle prosequi* immediately after the decision of this case, or otherwise, as the Court may think fit. But if the Court shall be of a contrary opinion, then the defendant agrees that judgment shall be entered against him by confession, of 10*l.* damages, immediately after the decision of this case, or otherwise, as the Court may think fit.

Thesiger, for the plaintiff.—The plaintiff's liability was put an end to by, or at least suspended during, the marriage, by the operation of the above clause. It may be said that it applies only where the illegitimate child was not actually chargeable at the time of the marriage. But

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that construction will not carry into effect the intention of the legislature, which was to prevent the husbands of women in such circumstances from obtaining the benefit of that *dowry* of illegitimate children, which was so pernicious both to the morality and the industry of the poor. Where the words of a statute are clear and unambiguous, the best course is to adopt them according to their natural and ordinary meaning. Even where the decision on the words of an act of Parliament was calculated to defeat its apparent object, the Court has held it better to abide by such consequence, than to put upon it a construction not warranted by its words, in order to give effect to its supposed intention. *Rex v. Barham (a)*.

Dampier, contra.—This order remained in force, notwithstanding the marriage of the mother. It is made under the statute 18 *Elix.* c. 2, s. 2, as amended by the 49 *Geo.* 3, c. 68. The 4 & 5 *Will.* 4, c. 76, s. 57, is *affirmative* only, and not *negative*, in its terms. The question then is, whether it shall operate to destroy the positive enactments of former statutes. The child is to be deemed a part of the husband's family only "for the purposes of the act;" not generally, or to all intents and purposes. Again, it appears from s. 70, which avoids securities given for the indemnity of parishes as to bastard children, that the act meant to preserve in force all such as had passed into absolute securities before the passing of the act, inasmuch as it is made to apply only to securities given in respect to children likely to be born bastards, and whereof any woman shall be pregnant at the time of the passing of the act. No doubt the husband is liable to the parish for relief given to the child; that is to say, he is liable, having this fund provided for him by means of the putative father. Both may be chargeable, and both primarily liable to the summary jurisdiction of the justices:

(a) 8 B. & Cress. 104.

in the same manner as two funds may co-exist for the repair of a highway,—the primary liability of the inhabitants of the district, and the tolls in the hands of trustees, to which the parish has a right to resort. *Rex v. Netherthong* (a), *Rex v. Inhabitants of Oxfordshire* (b). Both parties commit an offence if they do not provide the necessary funds. The words of the statute will not be violated, but maintained, by holding them applicable in their strict terms only to children thereafter born, or at all events to cases in which there was not before any complete security. If this be not so, the justices in sessions will have no power, under s. 72, to make orders upon the putative father after the marriage of the mother.

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Thesiger, in reply.—Where a later statute has affirmative words inconsistent with those of a former act, the former act must be held to be repealed. Such is the case here. It is said there are two funds for the relief of the child: but the statute says no such thing. The putative father is not to supply a fund *to the husband*: so long as the child continues chargeable, and the charge is to be provided for *under the order*, the putative father is liable to pay *to the parish*; it is a question altogether between him and the parish; the husband has nothing to do with that fund, nor with the claim of the parish on the putative father. If he has, how is he to reach the fund? The defendant must say, that payment by the father to the parish discharges the husband from the obligation of maintenance; whereas the act says positively that the husband shall maintain the child. [Lord Abinger, C. B.—Suppose the husband incapable from poverty of providing for the child, what would you say to that case?] Perhaps the liability might then attach again on the putative father; possibly the order is only suspended while the child continues to be maintainable as a part of the husband's

(a) 2 B. & Ald. 179. (b) 4 B. & Cress. 194; S. C. 6 D. & R. 231.

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family. This, however, would not prevent the general principle from having effect, although in the particular case it might not be capable of application. But in such case, the husband would himself become chargeable by reason of that inability, because he is chargeable for relief given to any part of his family.

LORD ABINGER, C. B.—I do not know whether the object of the legislature will be attained by the decision to which we think ourselves bound to come: but I think we are bound to interpret the positive provisions of this act as we find them, and that there is no reason why we should speculate on what would be the situation or claims of the parties, if the husband were incompetent to maintain the child: the effect of that would undoubtedly be, under this act, to bring the burden of himself and all his family upon the parish. But under the circumstances stated in this case, and assuming the husband to be competent to maintain the child (*a*), we have here a distinct parliamentary provision imposing the charge upon the husband. A fund is therefore provided for the maintenance of the child, and it is no longer chargeable upon the parish during the continuance of that fund. The orders of filiation under the former acts were to be made in ease of the parish, and the parish had no right to insist on them unless the child were chargeable. Then, by the provisions of this act, the child having ceased to be chargeable, the parish has no longer any power to claim the enforcement of the order.

PARKE, B.—I am of the same opinion. No question is raised as to the liability of the magistrate in the action of trespass; the question which, by agreement of the parties, is submitted for our decision, is, whether the putative

(*a*) This was admitted between the parties, although it was not expressly stated in the case.

father is still liable for the maintenance of this child; and it seems to me that he is not. It is admitted that the husband had sufficient funds for its maintenance; while they remain sufficient, the child cannot be said to be chargeable; but the putative father is liable only so long as the child continues chargeable. It is not necessary to say what would be the consequence in case of the husband's incompetency; but although it is true as a general proposition, that affirmative words in a statute do not operate as a repeal of a previous affirmative enactment, unless where they are clearly inconsistent, yet, looking at the general policy of this act of Parliament, and seeing no provision for the *joint* liability of the husband and the putative father, I should say the effect of the affirmative words in this clause is to repeal the provisions of the former acts which have been referred to, as inconsistent, and to destroy altogether the effect of the order during the marriage of the mother. And it may be observed, that this construction makes the whole system uniform: the putative father can never be called upon after the marriage; and it is clear from s. 72, that it is only in case of the inability of the *mother* that an order of bastardy can be made, in respect of after-born children, by the justices at sessions.

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BOLLAND, B.—I am of the same opinion. The words of the statute are clearly intended to impose upon the husband the liability of maintaining the illegitimate children of his wife. The liability to the parish can, at all events, only arise out of the inability of the husband; but it is admitted that he had in this case sufficient ability to maintain the child. And it is difficult to see how the putative father can continue liable at all. This test may be applied:—suppose, the child being chargeable, the mother marries; if the liability is still upon the putative father, this provision of the act is inoperative altogether. If the

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time arrives when the child attains the age of sixteen, or if the mother dies, the parish may be called upon to bear the charge, but not till then. I think the parish is, in this case, asking the Court to compel the putative father to do that which he is no longer bound to do by law.

GURNEY, B.—The statute certainly transferred the liability altogether from the putative father to the husband.

Judgment for the defendant.

GOUGENHEIM v. LANE and Others (a).

Where a plaintiff sues *in forma pauperis*, and recovers only a farthing damages, he is entitled to have his costs taxed in the usual way, and is not merely entitled to costs out of pocket.

Where there are several issues, on one of which only the plaintiff succeeds at the trial, the plaintiff is only entitled to the costs of such parts of the briefs, and such of the witnesses, as were necessary for the issue on which he succeeded.

Where, in an action by the plaintiff *in forma pauperis* against several defendants, a verdict is found for some of them, they are not entitled, under the rule of *Hilary Term 2 Will. 4*, s. 74, to have their costs deducted from the plaintiff's costs, because they would not be entitled in such a case to receive costs from the plaintiff.

THIS was an action of trespass brought by the plaintiff, who sued *in forma pauperis*, for assaulting and imprisoning him. The declaration contained four counts, the last of which was for imprisoning the plaintiff on the 12th of *October*, 1832. The defendants, six in number, severally pleaded the general issue (b). It appeared at the trial, that the plaintiff had been arrested on the 12th of *October*, 1832, upon a *capias ad satisfaciendum*, which had been irregularly issued out of the Sheriff's Court, and which was afterwards set aside. The plaintiff had been also arrested before on another writ, but the affidavit being defective, that writ was also set aside. The plaintiff also complained of other arrests, but one of the defendants, of the name of *Davies*, being only implicated in the last arrest, the plaintiff's counsel, on an objection being taken, elected to abandon

(a) This case was decided in *Michaelmas Term* last, but was inadvertently omitted.
(b) Before the new rules.

don all the other acts of trespass previously to that. The jury acquitted three of the defendants altogether, but found a verdict for the plaintiff against the other three, *Lane*, *Barrowcliff*, and *Davies*, on the fourth count, with one farthing damages. The three last-mentioned defendants were acquitted on the three first counts, which had been abandoned. An application was made to Lord *Lyndhurst*, C. B., at the trial, for a certificate to deprive the plaintiff of costs, which his Lordship refused. The plaintiff's attorney made out a bill of costs against all the defendants, to the amount of 110*l.*, and delivered it to *Lane's* attorney, who acted for all the defendants; and upon the taxation it was objected before the Master, that the plaintiff was only entitled to costs out of pocket, as he had recovered less than 5*l.*; but the Master taxed the plaintiff's costs in the usual way, on the ground that the *postea* gave him 40*s.*, and no authority was shewn for taxing the costs in any other than the usual way. The plaintiff's costs were taxed at 81*l.* 12*s.*, from which he deducted 10*l.* 17*s.* 6*d.* as the costs of *Lane*, *Barrowcliff*, and *Davies*, on the first three counts, but he refused to allow any costs to the defendants who obtained a verdict. *Erle* had obtained a rule to shew cause why the Master should not review his taxation, and why he should not be directed to allow the plaintiff his costs out of pocket only, and confine the costs to so much of the briefs and to such of the witnesses only as he should consider were necessary for establishing the imprisonment of the plaintiff, and the facts connected with it, subsequently to the 12th of *October*, 1832, and why the defendants who were acquitted should not have their costs deducted from the plaintiff's costs.

Crowder and *Mansel* shewed cause.—The plaintiff, although he sued as a pauper, having succeeded, is in the same situation with respect to receiving costs as any other

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plaintiff. *Rice v. Brown* (a) appears to be an authority to shew, that although a pauper, as such, can never pay costs, yet that he may receive them for the defaults of his opponents. They also cited *Blood v. Lee* (b). Whether the verdict covers one farthing or 5*l.*, it makes no difference as to the plaintiff's right to costs. *Secondly*, there is no ground for the application that the Master should confine the costs to so much of the briefs and to such of the witnesses only as were necessary for establishing the imprisonment of the plaintiff on the 12th of *October*, 1832, and the subsequent facts connected with it, because the plaintiff was obliged to adduce evidence before the jury of the first process, which was regular, and to connect the subsequent arrest on the *ca. sa.* with the previous proceedings. As to the third part of the application, that the defendants who were acquitted should have their costs deducted from the plaintiff's costs, the defendants cannot be entitled to receive costs from the plaintiff, because he was suing *in formâ pauperis*; and the rule of *Hilary Term 2 Will. 4*, s. 74, which provides that "the costs of all issues found for the defendant shall be deducted from the plaintiff's costs," can only apply to cases where the defendant is entitled to receive costs from the plaintiff. They cannot be in a better situation than if they had been sued alone; and if they had, and had got a verdict, they would not have been entitled to have their costs from the plaintiff, and therefore are not now entitled to have them deducted from the plaintiff's costs.

Erle, in support of the rule.—The rule is, that where a pauper recovers less than 5*l.*, the Master only allows costs out of pocket. The attorney brings the action in his client's name, at the risk of recovering to the extent of 5*l.* [*Alderson*, B.—Why should he be allowed only costs out of pocket?] It is stated in the affidavits, that all the pub-

(a) 1 Bos. & Pull. 24.

(b) 3 Wils. 24.

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lic officers had on that account refused their fees for passing the record, sealing subpoenas, court fees, &c., which they always take when the plaintiff recovers 5*l.*, which shews that they considered that a different practice prevails as to taxing costs, where the verdict is for less than 5*l.* [*Parke, B.*—The authorities are, that a pauper recovers costs although he does not recover 5*l.*, and he is entitled to have his costs taxed in the usual way; but the officers do not take their fees, unless he recovers that sum. The understanding is, that he is entitled to costs from the other side, but the attorney's services are gratuitous. *Alderson, B.*—I think that in this respect the taxation was correct.] At all events, the Master ought to review his taxation as to the allowance of witnesses, because the greater part of them were quite unnecessary to prove the case as respected the imprisonment on the 12th of *October*, as *Davies* had no connexion whatever with the cause in regard to the former imprisonments, which were abandoned at the trial.

PARKE, B.—The taxation may be referred back to the Master on the second objection, to ascertain what costs are proper, looking at the case with reference to the fact that the only acts of trespass substantiated against the defendants were on the 12th of *October* and subsequent days; and only such costs can be allowed as would have been necessary if the action had been brought for the trespasses committed on the 12th of *October* and subsequent days. With respect to setting off the costs of the defendants who succeeded, it is clear that we could not give them their costs, and therefore we have no power to order them to be set off.

The rest of the Court concurred.

Rule accordingly.

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LANE v. THELWELL.

A count for goods sold and delivered, stating that the defendant was on &c. indebted to the plaintiff in &c., for goods sold and delivered by the plaintiff to the defendant at his request, without any further allegation of time:—*Held* good on special demurrer.

ASSUMPSIT for goods sold.—The declaration stated that the defendant, on the 24th *October*, 1835, was indebted to the plaintiff in 20*l.* for goods sold and delivered by the plaintiff to the defendant at his request. Special demurrer, assigning for causes that the declaration was informal, in not stating any time when the said goods were sold and delivered, and that such time ought to have been stated with certainty, and that at least the word “then” ought to have been inserted in the declaration before the word “sold,” &c. Joinder in demurrer.

Addison, in support of the demurrer.—The count is informal for the reason assigned by the demurrer. This case is in effect decided by *Ferguson v. Mitchell* (a) and *Spyer v. Thelwell* (b), in which a count on an account stated was held bad for the want of the words “then and there,” that is to say, of the word “*then*,” since the *place* is now sufficiently indicated by the *venue* in the margin (c). And this is in conformity with the rule of *Trinity Term 1 Will. 4*, the form there given stating that “the defendant was indebted to the plaintiff in — for the price and value of goods *then and there* bargained and sold,” &c. The rule is, that every material and traversable fact must be laid with a time certain. *Com. Dig. Pleader*, c. 19, *Denison v. Brocklebank* (d). The sale of the goods is undeniably a material part of the declaration, even more so than the promise. [Lord *Abinger*, C. B.—The old form was, “*before that time* sold and delivered;” that stated no certain time.] It might not perhaps have been sustained if the objection had been taken on demurrer.

(a) 2 C. M. & R. 687.

(b) *Ibid.* 692.

(c) Reg. Gen. H. T. 4 W. 4,

(General Rules and Regulations, s. 8).

(d) 14 East, 301.

[*Parke, B.*—Are we now to say that that form, which has been adopted as long as living memory at least, is wrong?] A new state of things has been introduced by the new rules, and the old form, if not consistent with principle, ought no longer to be adhered to, especially when it is in opposition to the rule itself. If the goods were sold and delivered under a previous agreement, though the delivery was after action brought, that would satisfy this count as it now stands. In *Trevor v. Wall* (a), it was held, that where a plaintiff declares in an inferior court, the *consideration* as well as the *promise* must be alleged to be within the jurisdiction, because each was a material and traversable fact. In several cases pleadings have been held bad for want of a strict conformity to the rules. Thus a plea, in debt, that the defendant “never did owe” the sum demanded, instead of saying that he never was indebted, was held bad on special demurrer. *Smedley v. Joyce* (b). [*Parke, B.*—That was upon a rule given by the authority of an act of Parliament; but the rules of *Trinity Term 1 Will. 4*, are not so, and the forms there given are only by way of example, and not to be exceeded in length.]

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Busby, contrd.—If it be necessary to allege the time, such allegation may be sufficiently collected from this declaration. There is a plain distinction between this case and those decided on the account stated. There, the plaintiff relies on one single transaction, the statement of the account, as at once raising a promise by implication of law; and it is therefore reasonable that he should be bound to shew that the account had been stated at the time when the defendant is said to be indebted. But on a count for goods sold and delivered, the plaintiff may give in evidence any number of deliveries at different times, as to which,

(a) 1 T. R. 152.

(b) 2 C. M. & R. 721.

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therefore, the statement of all the dates would lead to unnecessary prolixity. The forms given in the rules of *Trinity Term 1 Will. 4*, are not prescribed as forms to be invariably adopted, but have reference merely to *costs*:—the object of the rule being the prevention of expense by the unreasonable length of pleadings in common cases, the counts used are only not to exceed in *length* the forms there given. Now, the goods *must* have been sold or delivered at or before the time when the defendant is said to be indebted; he could not be *indebted* for a prospective consideration,—for goods *to be* sold and delivered. It is admitted that the old form alleged no precise time; and under the same head of *Comyns' Digest* before referred to, many instances are given where the word "*postea*" only has been held to imply a sufficient allegation of time, a prior day having been before mentioned, or even when no specific day has been stated at all.

Addison replied.

LORD ABINGER, C. B.—I do not think the forms given in the rule in question were intended to introduce any matter which was not necessary before, but rather to reject matter which was unnecessarily made part of the old form. They could not be intended to alter the law as to what were or were not necessary allegations in pleading, either as to form or substance:—the Judges had no authority whatever to impose those forms upon the parties to actions as the law of the land. Then we are to consider whether the form adopted in the present case was sufficient. It is in effect the same as if the words "before that time," according to the old form, had been retained: the defendant could not be *indebted* unless the goods had been before delivered, the debt being a result of the delivery of the goods. This is, therefore, in effect a demurrer to the old form, which has been in use ever since the time of

Charles 2. The reason why the words "before that time" were considered sufficient, and why it was not necessary to specify any particular time, I take to be this:—that on a count for goods sold and delivered, the plaintiff may give in evidence many deliveries, the specification of the dates of which would only introduce an unnecessary length of statement: but the case is different of a man who is indebted on an account stated, because there the debt must arise at one specific time, viz. at the time of the statement of the account, or the day before, or some previous day. The Court has decided that in such case the word "then" is necessary, and I find no fault with that decision. But this rule of Court had no authority, and could not have the effect, of rendering the statement of time or place essential, where before it was wholly immaterial.

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PARKE, B.—I am of the same opinion, and concur in all that has been said by my Lord. By the old form, it was certainly unnecessary to state any particular time; the reason was, as stated by my Lord, that the plaintiff might recover in respect of many transactions, and it would be introducing unnecessary length of pleading to state all the times when they occurred: the words "before that time" were therefore adopted as the form, which undoubtedly contain no certain allegation of time. As to the account stated, I do not mean to say the Court was wrong in the decision which has been referred to; the constant practice has been to introduce the words "then and there;" and an account stated is a single insulated transaction, with respect to which the statement of time may be reasonably required. The present count is, however, in substance the same as if the words "before that time" had been inserted. And the Courts had no power, by the rule in question, to alter the forms of pleading; they merely give certain forms as examples, and prohibit any longer forms: but there is not therefore any illegality in any forms which do not

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conflict with that prohibition, and which contain all necessary allegations.

BOLLAND and GURNEY, Bs., concurred.

Judgment for the plaintiff.

WRIGHT v. SKINNER.

Since the Uniformity of Process Act, 2 Will. 4, c. 39, an attorney can no longer sue by attachment of privilege; and therefore, though he sues in his own Court as a common person, the Court will not enter a suggestion on the roll to deprive him of costs for not suing in the *Middlesex* Court of Requests.

THIS was an action of debt on an attorney's bill. Plea, *nunquam indebitatus*. At the trial before the under-sheriff of *Middlesex*, the plaintiff recovered a farthing damages.

C. Jones moved, on behalf of the defendant, for leave to enter a suggestion on the roll, under the *Middlesex* Court of Requests Act, to deprive the plaintiff of costs. He admitted that the plaintiff, being an attorney, was not bound to sue in the inferior Court; but it ought to appear on the record that he was an attorney, which was not the case here: *Tagg v. Madan* (a), *Parker v. Vaughan* (b), *Burn v. Passmore* (c). [*Parke, B.*—Since the Uniformity of Process Act, an attorney can no longer sue by attachment of privilege.]

Jones having suggested that he understood *Littledale, J.*, had decided against the attorney under the same circumstances, since the statute, the Court took time to confer with that learned Judge: and on a subsequent day,

PARKE, B., said—We have seen my Brother *Littledale*, who informs us that he has not delivered any such judgment as Mr. *Jones* supposes: but he is about to give judgment in the case alluded to, that there ought to be no rule,

(a) 1 Bos. & P. 629.

(b) 2 Bos. & P. 29.

(c) 1 Dowl. P. C. 17.

and that the attorney is still entitled to his privilege. Before the Uniformity of Process Act, an attorney had the power of suing by attachment of privilege; if, therefore, he sued as a common person, that shewed that he abandoned his privilege, and he was consequently liable to pay costs to the defendant, if he sued in the Court above for a debt recoverable in an inferior Court. But, since the Uniformity of Process Act, as he cannot any longer sue by attachment of privilege, his suing as an ordinary person is no proof that he abandons his privilege, and he is not bound to sue in the inferior Court; unless, indeed, the defendant is an attorney, when he also has privilege. There will therefore be no rule.

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Rule refused.

REX, on the prosecution of REYNOLDS, v. BRIDGER.

UPON the trial of a traverse of a return to a writ of *melius inquirendum* in outlawry, before *Bolland, B.*, at the Sittings at *Westminster*, after *Trinity Term*, 1832, a verdict was taken for the Crown, subject to the opinion of the Court, on the following case:—

On the 14th of *September*, 1769, *Robert Lathropp*, being seised in his demesne as of fee of and in the capital messuage called *West Felton Hall*, and also all the farms, lands, and hereditaments called *Felton Hall Farm*, situate respectively in the parish of *West Felton*, in the county of *Salop*, by his last will and testament, duly signed and published to pass real estates, devised the same unto *John Scott*, his heirs and assigns, to the use of his nephew *Robert Lathropp*, for life; and from and after his decease, to the use of the first son of his said nephew *Robert Lathropp* lawfully begotten, with divers remainders in the said will mentioned.

A., in *January*, 1815, was convicted of bigamy. In *April*, 1815, he conveyed away by lease and release certain lands in which he had a life estate:—*Held*, that such conveyance was not void as against the Crown, there having been no attainder.

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On the 1st day of *May*, 1770, the testator died seised, without having revoked or altered the said devise.

On the 1st day of *April*, 1785, *Robert Lathropp*, the testator's nephew, who had survived the testator, died, leaving *Robert William Felton Lathropp Murray*, his first son lawfully begotten, him surviving.

After the death of the said *Robert Lathropp*, the nephew, the said *R. W. F. L. Murray*, entered and became seised of and in the said mansion, farm, lands, and hereditaments, as tenant thereof for and during his natural life.

In *Trinity* Term, 1801, *R. W. F. L. Murray* levied a fine, with proclamations, of the aforesaid mansion, farm, lands, and hereditaments, and afterwards, on the 9th of *January*, 1815, was convicted of bigamy, and sentenced to transportation for seven years.

On the 15th and 16th days of *April*, 1815, *R. W. F. L. Murray* executed certain indentures of lease and release, assuming to convey thereby to the claimant, *Edward Bridger*, and his heirs, the said mansion, farm, lands, and hereditaments, for the life of him the said *R. W. F. L. Murray*.

On the 11th of *March*, 1830, *John Edward Reynolds*, in a suit in which he was plaintiff, and *R. W. F. L. Murray* was defendant, then pending in the Court of *King's Bench*, obtained a judgment of outlawry against *R. W. F. L. Murray*, and afterwards sued out of that Court a writ of *capias utlagatum*, tested the 28th day of *April*, 11 *Geo. 4*, 1830, upon which an inquisition was taken, finding that the outlaw had several pieces or parcels of land, but omitting to state what particular estate or interest the outlaw had in such lands.

A writ of *melius inquirendum et capias utlagatum*, tested the 23rd of *May*, 1 *Will. 4*, 1831, and returnable the 4th of *June* then next, was subsequently issued out of this Court, upon the application of the said *John Edward Reynolds*; to which the sheriff of *Salop* returned,

that the said *R. W. F. L. Murray*, the outlaw, at the time of the outlawry, and at the time of taking the last-mentioned inquisition, was seised in fee of and in the said mansion, farms, lands, and hereditaments, and that the said sheriff seized the same into the hands of the king by virtue of the said writ.

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The defendant, *Edward Bridger*, appeared to traverse this inquisition, and averred the seisin, will, devise, and death of *Robert Lathropp* the testator, of the survivorship and subsequent death of *Robert Lathropp* the nephew, the survivorship of *R. W. F. L. Murray*, his entry and seisin pursuant to the said devise, and subsequent execution of the said indentures of lease and release, and traversing specially that the said *R. W. F. L. Murray* was, at the time of the judgment of the outlawry, or at the time of the taking of the inquisition, seised in fee of the said manor, farm, lands, and hereditaments.

The Attorney-General replied, that the said *R. W. F. L. Murray* was seised in fee of the premises in question, in the terms of the traverse, upon which issue was joined; and further, that upon the 9th of *July*, 1815, and before the conveyance to the defendant *Bridger*, the said *R. W. F. L. Murray* was convicted of bigamy, for having, on the 25th of *August*, 1801, married a second wife, his first wife being then alive, and was sentenced to be transported for seven years. To this the defendant rejoined *nul tiel record*.

At the trial the prosecutor proved the levying of the fine with proclamations by the said *R. W. F. L. Murray* of the premises in question, in *Trinity* Term, 41 *Geo. 3*, 1801, and also the conviction of the outlaw, as stated in the record; upon which the counsel for the defendant produced and proved the conveyance to the defendant by the outlaw, as heretofore mentioned.

Either party is to be at liberty to refer to the record as part of this case.

The questions for the opinion of the Court are—

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1st, Whether the said *R. W. F. L. Murray* was, taking into consideration the records and facts as above stated, seised in fee of the premises in question, as stated in the inquisition.

2nd, And whether, if the said *R. W. F. L. Murray* was not so seised in fee, the said defendant is entitled, under the circumstances, to traverse this inquisition.

If the Court should be of opinion that he was so seised, or that the defendant was not entitled to traverse the inquisition, the verdict is to stand; but if of the contrary opinion, the verdict is to be entered for the defendant.

John Jervis, for the Crown.—If, upon the whole record, it is made to appear that the defendant has no title, the Crown will come in—not indeed upon the outlawry—but the property being in the hands of the Crown by the seizure of the sheriff, the defendant will be bound to come and shew his right to oust the Crown, and have his writ of *amoveas manus*. It must be admitted that a conviction for bigamy does not work an attainder, or of itself vest the effects of the convict in the Crown; but it is contended that the subsequent conveyance was nevertheless fraudulent and void. [*Parke, B.*—There is no issue on that, unless indeed you can make out that the necessary consequence of the *conviction* was to make the conveyance void.] Under the former statute, 1 *Jac.* 1, c. 11, s. 4, the Crown would clearly have been entitled to the profits of the land, at all events during the life of the convict, although there would be no escheat to the lord; 1 *Hale, P. C.* 703; 2 *Hawk.* c. 49, s. 29; *Lovell's case* (a); and even now, though the land itself would not escheat to the Crown, yet this indenture is void, for it purports to convey immediately after the conviction, when the Crown would, at all events, be entitled to the year and day. [*Parke, B.*—No; you must have an at-

(a) 1 Salk. 85.

tainder: there is no year, day, and waste without attainder (a).]

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Lord ABINGER, C. B.—I do not see that you have any case whatever, unless you can make out a conviction to be an attainder.

Platt appeared to argue for the defendant.

Judgment for the defendant.

(a) See 2 Inst. 55; 4 Bl. Comm. 386.

JOHNSON v. HAMILTON.

ASSUMPSIT by the plaintiff, as administrator of one *Stamford*, against the defendant, for seaman's wages due to the intestate. At the last *Liverpool* Assizes, the plaintiff recovered a verdict. In *Michaelmas* Term, *Wightman* moved to arrest the judgment, on affidavits which stated in substance, that on the 11th of *February*, 1835, the plaintiff sailed from *Liverpool* for the *Bight of Benin*, on board a vessel named the *Champion*; that several vessels which had since sailed from *Liverpool* for the same port had arrived there, and letters had been received from them at *Liverpool*, but that the *Champion* had never been heard of since; that it appeared from the entries in *Lloyd's List* for *February*, 1835, that in that month heavy storms prevailed in the *Irish* sea, and spars and oars, having the name "*Champion*" upon them, had been washed on the shore of *Carnarvonshire*; and that the insurers of the vessel had paid for her as for a total loss. He contended that these circumstances furnished sufficient proof that the plaintiff was dead before the trial.

The Court will not stay the *postea* in the hands of the associate, after verdict for the plaintiff, on affidavits shewing a strong probability that the plaintiff was dead before the trial; such facts must be shewn as would be evidence of the death before a jury.

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The Court refused to arrest the judgment, but granted a rule to shew cause why the *postea* should not remain in the hands of the associate until the further order of the Court, and why in the mean time execution should not be stayed.

Alexander (*Crompton* with him) now shewed cause.—The rule of law on which the presumption of death rests, is not satisfied by the evidence presented in these affidavits. The lapse of time in this case is of course wholly insufficient to afford ground for such presumption. Then the statement from *Lloyd's List* is mere hearsay; that publication is not legal evidence of the fact of the loss; nor are the other circumstances stated at all conclusive. These facts were equally in the knowledge of the defendant at the time of the trial, and yet he never attempted then to set up this defence.

Wightman, *contra*, urged that it was not now suggested on the other side that the plaintiff was alive or had been heard of; and that the affidavits, standing unanswered, raised a satisfactory presumption that he was dead before the trial.

LORD ABINGER, C. B.—I believe we do not consider it very *probable* but that the plaintiff was lost in this vessel; but the question is, whether you have made it out so certainly as to induce us to act on the presumption—as that we can draw a *certain* conclusion. Now, the affidavits really present no one fact that would be evidence before a jury, and raise at most only a strong probability.

PARKE, B.—The defendant has by law a power of availing himself of the objection, if it be well founded, by writ of error; he might also have raised it at the trial by pleading the death in abatement *puis darrein continuance*. The chief object of granting the rule was, to see whether

it would produce any statement from the other side to shew that the man was alive. That, however, it has not succeeded in doing; but I am still of opinion that there is not sufficient ground shewn for us to make the rule absolute.

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Rule discharged.

VERNON, Assignee of the Sheriff of STAFFORDSHIRE,
v. HODGINS.

ARCHBOLD moved to set aside the interlocutory judgment signed in this cause, which was an action of debt on a bail-bond, for irregularity. It appeared by the affidavits that the declaration was filed on the 24th *November*: on the 2nd *December* the defendant obtained a week's time to plead, on the usual terms; on the 9th an application was made at chambers to set aside the plaintiff's proceedings for irregularity, and dismissed; on the same day the defendant pleaded a demurrable plea; and on the 23rd a demurrer to the plea was delivered. The time for joining in demurrer was enlarged by a Judge's order till the 12th of *January*. On that day a rule *nisi* was obtained for setting aside the proceedings on the bail-bond, to shew cause on the 16th; which rule was drawn up with a stay of proceedings. It was afterwards enlarged till the 20th, and stood over by consent till the 25th, when it was discharged after argument. On the same day, at six o'clock, the defendant not having joined in demurrer, the plaintiff signed judgment. *Archbold* insisted that this was irregular, and that the defendant, as he had the whole of the 12th, the day on which the rule was obtained, to join in demurrer, had also the whole of the 25th, the day on which it was discharged, for the same purpose; and on that day, at seven o'clock, the joinder in demurrer was delivered.—*Swayne v. Crammond* (a) is an authority that wherever a

Where a defendant obtains a rule which stays the plaintiff's proceedings, he is entitled to the whole of the day on which such rule is disposed of for taking the next step.

(a) 4 T. R. 176.

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rule is drawn up with a stay of proceedings, the party has the same time after the rule is disposed of to take the next step, as he had when it was granted. Such, at least, was the old rule of practice. It is true that in *St. Hanlaire v. Byam* (a) the distinction was taken, that the staying of proceedings applies only to the adverse proceedings of the plaintiff, and not to the proceedings of the defendant for his own security; and the Court there compelled the defendant, whose rule *nisi* had been discharged with costs, to take the next step immediately. But *Swayne v. Crammond* was not referred to in that case; and in a still later case, *Hughes v. Walden* (b), an intermediate rule was adopted; and it was held, that although the defendant is not, under such circumstances, entitled to the same time for taking the next step as he had when he obtained the rule, yet he should have a reasonable time for the purpose, and that the whole of the day on which the rule was disposed of was such reasonable time. According, therefore, either to the old practice or the new, this judgment was signed too early.

Erle, who shewed cause in the first instance, again referred to *St. Hanlaire v. Byam*, and urged that it was unreasonable that the defendant should be exempted from going on by his own rule, when the thing to be done was a step by himself, having no relation to any act done by the plaintiff; and that the joinder in demurrer might, without any difficulty, have been delivered immediately on the rule being disposed of.

PARKE, B.—We ought to abide by the last case decided on the subject, although perhaps that of *St. Hanlaire v. Byam* is the one most consistent with principle; because otherwise the party is enabled to get time by means of his own false allegation. He ought, if he requires time, to apply for it when the rule is disposed of. However, the practice must be understood as being

(a) 7 D. & R. 458; 4 B. & C. 970. (b) 5 B. & C. 770, n.

henceforth settled in conformity with the case of *Hughes v. Walden*. *Exch. of Pleas, 1836.*

The other Barons concurred.

Rule absolute.

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SARD v. RHODES.

ASSUMPSIT against the acceptor of a bill of exchange for 43*l.*, drawn by one *George Parish*, payable three months after date to his own order, and by him indorsed to the plaintiff.

To this count the defendant pleaded, *Fourthly*—That, before the said bill became due, he accepted the said bill for the accommodation of the said *George Parish*, and that there never was any consideration or value for such acceptance, or for the defendant's payment of the said bill, or any part of the amount thereof, whereof the plaintiff had notice; and that after the said bill became due, and before the commencement of this suit, to wit, on the 1st day of *August*, 1835, the said *George Parish* made his promissory note in writing, and thereby promised to pay to the plaintiff, or order, 44*l.*, divers, to wit, six weeks after date; and then delivered the said note to the plaintiff in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill and the said cause of action in the first count mentioned; and this the defendant is ready to verify, &c.

Replication.—That although true it is that the said *George Parish* did make and deliver to the plaintiff the said promissory note in that plea mentioned in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned, yet the plaintiff avers that the said promissory note became due and

Assumpsit by the indorsee against the acceptor of a bill of exchange for 43*l.* Plea, that, after the bill became due, one *G. P.*, the drawer of the bill, made his promissory note for 44*l.*, and delivered the same to the plaintiff in full satisfaction and discharge of the bill. Replication, that although he, the plaintiff, accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid:—*Held*, that the replication was bad, and that the plaintiff having accepted the note in full satisfaction and discharge of the bill, could not sue upon the latter.

Held, also, that the plea was sufficient.

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payable according to the tenor and effect thereof, at a day long since elapsed, to wit, the 15th of *September*, 1835; and that the said promissory note still remains in the hands of the plaintiff wholly unpaid and unsatisfied; and this he the said plaintiff is ready to verify, &c.

Demurrer, assigning the following causes:—That it is admitted by the replication that the plaintiff took and received the said promissory note from the said *George Parish* as aforesaid, with notice that the defendant had accepted the said bill in the first count mentioned for the accommodation of the said *George Parish*, and without consideration or value, as in the said fourth plea alleged; and also that the said *George Parish* made and delivered the said note to the plaintiff, and he took the same not merely on account or in payment of the said bill in the declaration mentioned, but in full satisfaction and discharge thereof, and of the cause of action in the said first count mentioned; nevertheless, the plaintiff hath stated, and attempted in answer to the said fourth plea to put in issue, a matter immaterial to the decision of this cause in regard to the said fourth plea; that is to say, that the said note hath not been honoured by the said *George Parish* and is unpaid: whereas if, as is admitted, the said note was taken absolutely in satisfaction and discharge of the said cause of action in the first count mentioned, the defendant's liability on the said bill could not revive upon the dishonour of the said note; and the note of a third person may be an absolute discharge and extinguishment of the claim upon a bill of exchange; and also for that it is not alleged in the replication that the said promissory note became due or was dishonoured before the commencement of this suit, or was then in the plaintiff's hands; or that the said *George Parish* was ever requested to pay the same; or that the same was presented for payment; or that the defendant had any notice of its nonpayment, or was after the dishonour of the said note requested to pay the amount of the said bill.

Joinder in demurrer.

In the margin of the demurrer-book it was stated, that the causes of demurrer are those assigned, and chiefly that the non-payment of *Parish's* note, taken in satisfaction, did not revive the defendant's liability; and that it was not alleged that the note became due before the action was commenced.

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Thesiger, in support of the demurrer, was stopped by the Court, who called upon—

T. W. Tyndale, *contrà*, who objected to the sufficiency of the plea, and contended that it was no answer to the action: that though the defendant had given a note to the plaintiff in satisfaction of the bill, yet the note having subsequently been dishonoured, it did not amount to an absolute discharge of the defendant's liability on the bill. [*Parke*, B.—It appears that the note was for a larger amount.] It is submitted that it was given as a collateral security. He referred to *Richardson v. Rickman* (a).

LORD ABINGER, C. B.—This is a plea in accord and satisfaction, and the consideration is complete. The plaintiff admits by the replication that he took it in full satisfaction and discharge of the bill.

PARKE, B.—The note is in the plaintiff's hands overdue and unpaid, and he may sue upon it. It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better or worse. This is not like the case of *Kearslake v. Morgan* (b), where it was admitted that the nonpayment of the note when due, there being no laches on the part of the plaintiff, would revive the remedy on the original debt; for there it was averred that the indorsement was "for and on account" of the original debt. If it had

(a) Cited 5 T. R. 517.

(b) 5 T. R. 513.

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been averred here that the promissory note was given for and on account of the bill, it might have been different (a).

Tyndale then obtained leave to amend on payment of costs.

Leave to amend accordingly.

(a) See *Lewis v. Lyster*, 2 C. M. & R. 707.

BURLEY v. STEPHENS and Wife.

A cause was referred by order of *Nisi Prius* to the decision of an arbitrator, so as he made his award before the fourth day of *Easter* term, with power to enlarge the time, but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired, the arbitrator, in the presence of both parties, appointed another meeting on the 29th of *June*, on which day one of the parties not having attended, the arbitrator made his award:—
Held, that the appointment of a further day for the reference, neither party making any objection to it, amounted to a due enlargement of the time.

THE above cause, and another between the same parties, had been referred to arbitration by order of *Nisi Prius*, at the last *Spring* Assizes for the county of *Gloucester*, the arbitrator to make his award on or before the fourth day of *Easter* Term, but with power to him to enlarge the time for making his award.

Martin, in *Michaelmas* Term last, obtained a rule to shew cause why the award should not be set aside, on the ground that there had been no due enlargement of the time; the affidavits on which he moved stated, that by the terms of the order the enlargement was to be by indorsement thereon, and that no such indorsement had been made.

W. J. Alexander in this term shewed cause, and produced the order, by which it appeared that there was no such provision as to the mode of enlarging the time. The affidavits on which he shewed cause, stated the following facts:—On the 16th of *April*, two days before the time expired, the arbitrator, in the presence of both parties, appointed another meeting for the 29th of *June*, when the defendant was to have produced further evidence. No objection was made to this appointment by

The power given to the Court or a Judge by 3 & 4 *Will. 4*, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, is general, and is not confined to cases where there has been a revocation of the submission.

either party; but the defendants did not attend on the day named, and the arbitrator made his award on that day. An application was made to *Parke*, B., and afterwards to this Court in *Trinity* Term, to enlarge the time for making the award, under the 3 & 4 Will. 4, c. 42, s. 39, but his lordship and the Court refused to interfere. [*Parke*, B.—With regard to the power which the Courts or a Judge have under that statute, it was my impression that it only existed in cases where there has been an attempt to revoke the submission. I have now satisfied my mind that that is erroneous, and I expressed an opinion to that effect in a late case in this Court (a); and I now agree with the rest of the Court in the opinion which they entertain, that the power is general and applies to all cases.]

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Martin, in support of the rule.—It is clear that the arbitrator never enlarged the time in any way; and having the power to enlarge it, it is not likely that any consent should have been given. It is submitted that the enlargement could only be made by rule of Court. [*Parke*, B.—We cannot set aside the award, unless we are clear that it was made after the time for making the award has expired. There was evidence from which an agreement that it should be enlarged till the 29th of *June* might be presumed. Is there any case as to the mode of enlarging the time?]

W. J. Alexander.—In *Rex v. Hill* (b), it was held, that, under the circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority, where the conduct of the parties was equivalent to a consent to extend the time. In *Wilkinson v. Tine* (c), it was held, that where in an ac-

(a) *Potter v. Newman*, 2 C. M. & R. 742.

(b) 7 Price, 636.

(c) 4 Dowl. P. C. 37.

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tion of trespass, the time for making an award pursuant to an order of *Nisi Prius* had expired, and the arbitrator had not enlarged the time, as empowered by the order, the Court would, under certain circumstances, direct judgment to be signed, and execution issued, for the sum for which the jury found subject to the reference, unless the enlargement was consented to. *Coleridge, J.*, there says, "There is no dispute that the Court has the power to direct judgment and execution to issue for the full amount of the verdict, unless the defendant will consent to the time for making the award being enlarged." [*Parke, B.*—I thought it was perfectly settled that the Court has no power to order judgment to be entered up for the amount of the verdict, unless the amount of damages is the only matter referred. *Hall v. Phillips (a)*, *Taylor v. Gregory (b)*. The question now is, whether what the arbitrator has done amounted to an enlargement of the time within the meaning of the order, or whether the conduct of the parties amounted to a fresh submission. We must look into the affidavits, in order to enable us to determine that question.]

Cur. adv. vult.

PARKE, B., on a subsequent day, delivered the judgment of the Court.—After reading the order of *Nisi Prius*, he continued:—No special mode of enlargement is pointed out; it is not stated either that it is to be by indorsement, or in writing at all. It was objected, that there was no due enlargement of the time by the arbitrator, and the objection was taken on the supposition that the rule of reference contained the usual power to enlarge by an indorsement. That turned out not to be the case; but the Court, though entertaining some doubt whether what had taken place amounted to a due enlarge-

(a) 9 Bing. 89; 2 Moo. & Scott, 167.

(b) 2 B. & Adol. 774.

ment of the time, thought there was at all events ground to presume a fresh agreement by parol, on the terms of the former submission. It was afterwards suggested that the plaintiff was proceeding to tax his costs upon the judgment on the award, and it therefore became necessary to decide the point whether this was a proper enlargement in fact. On referring to the books, we do not find any decision as to the mode in which an enlargement is to take place, where no specific mode is pointed out in the submission. Here, then, it appearing that the arbitrator, in the presence of the agents of both parties, declared that the next meeting should take place on a particular day, viz. the 29th of *June*, which was not objected to by either of them, and that on the 29th of *June* he attended and made his award; we think that this was a due enlargement of the time: therefore the award was made in due time, and the rule must be discharged.

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Rule discharged.

DAVIS v. HOLDING.

ASSUMPSIT on a bill of exchange dated the 9th of *July*, 1835, drawn by the plaintiff upon the defendant, for 45*l.* 5*s.* 6*d.*, value received, payable four months after date, and accepted by the defendant.

Plea.—That before the making and acceptance of the said bill of exchange, to wit, on &c., the defendant then being a trader within the true intent and meaning of the statutes then in force concerning bankrupts, was indebted to the plaintiff in the sum of 100*l.* and upwards, for a true and just debt due and owing to him the plaintiff, and the defendant was then also indebted to divers other persons in divers other large sums of money; and the

An agreement between a petitioning creditor, who has sued out a fiat in bankruptcy, and the bankrupt, that the former shall abandon the prosecution of the fiat, and that the bankrupt shall accept a bill of exchange for a certain amount, is illegal, even as between the bankrupt and the petitioning creditor; and

the bill of exchange accepted by the bankrupt, in pursuance of such an agreement, is void, and no action can be maintained upon it.

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defendant being so indebted, and being such trader as aforesaid, and the said debt being then due and unsatisfied, he, the defendant, then became and was a bankrupt, within the true intent and meaning of the said statutes concerning bankrupts; and thereupon afterwards, to wit, on the 2nd *July*, 1835, a certain fiat bearing date the day and year last aforesaid, grounded upon the said statutes, upon the petition of the plaintiff, was duly awarded and issued by the Right Honourable the Lords Commissioners having the custody of the Great Seal of *Great Britain*, against the defendant, the plaintiff having before then made such affidavit and given such bond as by law in that case was and is required, and by which said fiat the said Lords Commissioners authorized the plaintiff to prosecute his said complaint or petition in His Majesty's Court of *Bankruptcy* in that behalf. And the defendant avers that the said fiat being in full force, and the defendant remaining and continuing so indebted to the plaintiff and the said other persons, afterwards, and before the defendant had been adjudged to be a bankrupt, within the true intent and meaning of the said statutes, under the said fiat, and before the defendant had obtained any certificate of conformity to the said fiat, to wit, on the day and year in the said first count mentioned, it was wrongfully and against the form of the said statutes and laws then in force concerning bankrupts, agreed by and between the plaintiff and the defendant, without the concurrence or consent of the said other creditors of the defendant, that the plaintiff should not further prosecute or put in force, or cause to be prosecuted or put in force, the said fiat; and that he should abandon the same, and all further prosecution of and proceedings under the same; and that, in consideration thereof, the defendant should accept the said bill of exchange in the said first count mentioned, and deliver the same to the plaintiff. And the defendant says, that, in pursuance of the said agreement,

and in performance and fulfilment thereof, the defendant did afterwards, to wit, on &c., accept the said bill of exchange, and deliver the same to the plaintiff, and the plaintiff then received the same from the defendant accordingly. And the defendant avers that the consideration in this plea mentioned, and so agreed on as aforesaid, was the consideration for the acceptance of the said bill by the defendant as aforesaid.—Verification.

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Special demurrer, assigning for cause, that it did not appear in or by the said plea that the consideration in the plea mentioned as the consideration for the acceptance of the bill, was the only consideration for such acceptance; and also for that it did not appear in or by the said plea but that the defendant received other good and valuable consideration for the acceptance and payment by him, the defendant, of the bill of exchange.

Joinder in demurrer.

The point stated for argument on the part of the plaintiff was, that the facts stated in the plea did not render the bill of exchange invalid as against the defendant, but on the contrary shewed a full and sufficient legal consideration for the acceptance of the bill.

Erle, in support of the demurrer.—*First*, it does not appear that the consideration mentioned in the plea as the consideration for the acceptance, was the sole consideration for it; and it appears by the plea that the defendant was indebted to the plaintiff in the sum of 100*l.*, which greatly exceeds the amount of the bill of exchange. But it will be said, that, according to the facts stated in the plea, the bill was given on a contract which was illegal, and prohibited by 6 *Geo.* 4, c. 16, s. 8. That section enacts, “that if any such trader, liable by virtue of that act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any

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satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue; and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, *shall forfeit his whole debt*, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt." It may be admitted that, as against the original creditors or the assignees, this transaction would have been illegal; but unless a commission issued on the docket, and the Lord Chancellor declared it valid, and directed it to be proceeded in, the debt is not forfeited, nor the security avoided. But this is a question between the bankrupt and a creditor, and as between these parties there was no illegality. The mere neglect to prosecute the commission is not a breach of duty, for the petitioning creditor is not compellable to prosecute it. On the contrary, by Lord *Rosslyn's* order, the commission is supersedeable if not prosecuted within fourteen days after its date, if it is to be executed in *London*, or within twenty-eight days if in the country. [*Parke, B.*—If it is shewn that any part of the consideration for the security was the foregoing of the commission, it will be illegal altogether. Lord *Thurlow* appears to have been of opinion that such an agreement as this was a fraud upon the Great Seal. *Ex*

parte Thompson (a). There are cases which establish that a defendant may set up as a defence to an action, that the transaction in respect of which he is sued is a fraud upon a third party, as in *Jackson v. Duchaire (b)*. How, then, can the plaintiff rely upon this bill of exchange, which is a fraud upon the other creditors?] Its being a fraud or not, depends upon whether the commission is ultimately prosecuted or not, and it does not appear upon this plea that any parties were defrauded. In *Jackson v. Duchaire*, the fraud upon the third party was disclosed. [*Parke, B.*—If the consideration for the bill had been a fraudulent preference, it would have been good as between the parties, though void as against creditors.]

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Humfrey, contra.—It is true that the plea does not state that this was the only consideration for the acceptance of the bill, but that is not necessary. This case is similar to that of a plea of usury, where it is not the practice to allege that there was no other consideration. The only question is, whether this bill was accepted for an illegal consideration. It is submitted that it clearly was, as being contrary to the provision of the 6 *Geo. 4*, c. 16, s. 8. According to that section, the petitioning creditor who receives any security for his debt after the striking of the docket, shall forfeit his whole debt. Lord *Thurlow* considered that such a transaction was a fraud upon the Great Seal. The reason of that is, that where one creditor sues out a fiat, all the others are prevented from suing out another for fourteen or twenty-eight days; so that any creditor, by suing out a fiat, may prevent the other creditors from taking any step until he has compromised his own debt. By suing out the fiat, he becomes a trustee of the bankrupt's estate for the benefit of himself and the other creditors, and it is a breach of

(a) 1 *Ves. jun.* 158.

(b) 3 *T. R.* 551.

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trust in him to endeavour to obtain more than his just proportion. In *Ex parte Paxton* (a), it was held, that a creditor who obtained a new security for a former debt, on which he had struck a docket, had no right to prove on that new security under a commission subsequently sued out. It is true it does not appear on this plea whether the bill was given as a composition for the original debt, or as a *bonus* for abandoning the prosecution of the fiat; but in either view of the case it is contrary to law, and the debt is forfeited. [Lord Abinger, C. B.—The difficulty is, to decide whether it is forfeited when no commission is sued out. Parke, B.—Unless the bill was given as a composition for the debt, it does not appear to come within the words of the statute.] It is submitted that it is clearly within the spirit of it.

Erle, in reply.—This could only be a fraud on the law and the Great Seal, where it is shewn that there are persons whom the law and the Great Seal could protect; but it does not appear upon this plea that in this case there were any such persons. There may have been sufficient assets to pay all the creditors in full, and if that were the case it would not be unlawful for a petitioning creditor to abandon his prosecution of the fiat. That was so held in *Ex parte Smith* (b). If the defendant had had funds enough to pay all his creditors in full, and had agreed that if the plaintiff would withdraw his fiat he would pay him 45*l.*, that would surely have been a valid contract, and a fraud upon no one. And that may have been so in the present case.

Cur. adv. vult.

LORD ABINGER, C. B.—The objections to this plea were, *first*, that, instead of shewing a want of consideration for

(a) 15 Ves. 464.

(b) 2 Glyn & J. 291.

the acceptance of the bill, it disclosed a sufficient consideration; and *secondly*, that there was no illegality in the contract in pursuance of which it was given.

It is unnecessary to decide whether the plea must be taken to aver that the acceptance was given wholly as a premium or gratuity for abandoning the fiat of bankruptcy, or whether it was given for the debt of 100*l.* and upwards due to the plaintiff, in consideration of his so doing. If the agreement to abandon the fiat for a special benefit to the plaintiff was illegal, it avoids the bill of exchange between these parties, whether such agreement was a part or the whole of the consideration for giving it.

We are of opinion, that the facts stated in this plea sufficiently shew the agreement to have been illegal.

The objection was, that the agreement was illegal and void only against creditors of the defendant *claiming under a commission*, not against his creditors generally; and though it was averred that there were unpaid creditors at the time of the agreement, it was not alleged that they had sued out or could sue out another fiat.

We think that this objection is not well founded. Independently of the provision of the 6 Geo. 4, c. 16, s. 8, which makes a trader's composition with the petitioning creditor an act of bankruptcy, and renders the creditor liable to refund what he has received, and to forfeit his original debt, such a composition is illegal, on the ground of its being an abuse of a process which a creditor has a right to sue out, not for his own benefit only, but for that of the other creditors also. Upon this principle the case of *Ex parte Thompson* (a) was decided by Lord *Thurlow*; and his Lordship ordered a sum of money received by the petitioning creditor to be refunded to the trader, although the commission had been superseded, and no fresh commission had been issued.

(a) 1 Ves. jun. 157.

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This order was, no doubt, made by virtue of the general jurisdiction of the Great Seal in matters of bankruptcy; but the reason of its exercise in this particular mode was, that the composition itself was illegal and void by the general policy of the law against the then creditors of the bankrupt; and no Court ought to enforce an executory contract which is illegal and void, at the time it is made, against other persons. The cases of *Jackson v. Duchaire* (a), *Cockshott v. Bennett* (b), and *Leicester v. Rose and others* (c), proceed upon this principle.

The transactions referred to in the course of the argument, as being valid between the parties, but fraudulent and void only as against third persons, such as the transfer of property to defraud execution creditors, or in contemplation of bankruptcy, are cases of *executed* contracts, in which the property actually passed.

We are of opinion that our judgment must be for the defendant.

Judgment for the defendant.

(a) 3 T. R. 551.

(b) 2 T. R. 763.

(c) 4 East, 372.

WORRALL v. GRAYSON.

Assumpsit for money paid, for interest, and on an account stated. *Plea*, that at the time of the commencing of this suit, and at the time of the accruing of the causes of action

ASSUMPSIT for money paid, for interest, and on an account stated.

Plea—That before and at the time of the commencing of this suit, and at the time of the accruing of the cause of action in the declaration mentioned, to wit, on the 1st day of *November*, in the year 1824, the plaintiff and defendant

in the declaration mentioned, the plaintiff and defendant carried on business in co-partnership, and that the causes of action arose out of transactions between the plaintiff and defendant as such co-partners; and that, at the time of the commencement of the suit, the accounts of the partnership were not settled or adjusted, or any balance struck between the plaintiff and defendant. On special demurrer:—*Held*, that the plea was ill: *first*, because it did not shew that this was a partnership transaction; *secondly*, nor that the debt was due to the plaintiff and defendant jointly; *thirdly*, that if it was to be taken to be so alleged, the plea was bad as amounting to the general issue.

used, exercised, and carried on the trades and businesses of millers, farmers, and smiths in copartnership; and the defendant says, that the causes of action in the declaration mentioned arose out of and from transactions between plaintiff and defendant as such copartners; and that at the time of the commencement of this suit the accounts of the said partnership were not settled, adjusted, or any balance struck by and between the plaintiff and defendant, and the same still are open and unadjusted; and this the defendant is ready to verify &c.

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Special demurrer, assigning a great variety of causes; amongst others, that the plea was an argumentative denial of the promises alleged in the declaration, and amounted to the general issue of *non assumpsit*; and also that the averment that the causes of action arose out of transactions between the plaintiff and defendant as copartners was too vague, general, and uncertain; and also that it is not shewn that the said transactions were of such a character as to bar the plaintiff from an action at law, or how the causes of action arose therefrom, &c.

Joinder in demurrer.

The points stated for argument on the part of the plaintiff were, that the plea amounted to the general issue, and that the expression "transactions between the plaintiff and defendant as copartners," was too general; and the other points stated in the demurrer.

Addison, in support of the demurrer, was stopped by the Court, who called on—

Petersdorff to support the plea.—The defence set forth in the plea could not have been given in evidence under the general issue, and therefore the demurrer cannot be supported on that ground. [*Parke*, B.—Why could it not be given in evidence under the general issue? It would shew that the defendant made no separate promise.]

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LORD ABINGER, C. B.—There may be a state of circumstances in which a debt arising out of partnership transactions may be due to one partner, and for which he may be entitled to sue alone; but it is not even shewn in the present case that this debt did arise out of any partnership transaction.

PARKE, B.—There are three objections to the plea in this case.—*First*, the plea does not allege that this was a partnership transaction; and it is quite consistent with all that appears on this plea, that the money was paid for the defendant without reference to any partnership transactions.—*Secondly*, it does not appear that the debt was due to the plaintiff and defendant jointly. But, *thirdly*, if that is to be taken as so alleged in the plea, then it amounts to the general issue. And if it is to be considered as a denial that any account was stated, then it also amounts to the general issue.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

STRACY v. BLAKE.

An admission on the face of one plea cannot be made use of to prove or disprove another plea.

But where it appears, from the whole conduct of a cause, that a particular fact is admitted

between the parties, the jury have a right to draw the same conclusion as to that fact as if it had been proved in evidence; and to draw such conclusion as to all the issues on the record. And the Court refused to grant a new trial, on the ground that the Judge had stated to the jury a fact so admitted between the parties, as being admitted *on the record*, and applied such supposed admission in support of another issue.

DEBT for money lent, money paid, and on an account stated.—Pleas, *first*—*nunquam indebitatus*; *secondly*, that after the supposed debts and several causes of action, and each of them, in the declaration mentioned, accrued to the plaintiff, to wit, on the 25th of *December*, 1832, the defendant was a prisoner in the custody of the Warden of the *Fleet*, within the walls of the prison, on pro-

cess of action at the suit of one *W. Pitfold*, within the meaning of the 7 *Geo.* 4, c. 57; and that afterwards; and while the defendant remained in custody as aforesaid, and within the space of fourteen days next after the commencement of the actual custody aforesaid, to wit, on the 31st of *December*, 1832, the defendant duly applied by petition, in a summary way, to the Court for the Relief of Insolvent Debtors, for his discharge from the custody aforesaid, according to the provisions of the said act, and in compliance therewith, and did then and there subscribe such petition, and filed the same in the said Court, and duly executed a conveyance and assignment to one *S. S.*, then being the provisional assignee of such Court, in such form as is to the said act annexed, of all the estate, &c., of the defendant, such prisoner, in and to all his real and personal estate and effects, except &c. &c.; and afterwards, and within fourteen days next after his said petition had been filed as aforesaid, and after the said supposed debts and causes of action had accrued, to wit, on the 31st of *December*, 1832, he the defendant did deliver, in to the said Court a schedule containing as in the said act is required, except as hereinafter mentioned, and duly subscribed by him, and which was then duly filed in the said Court; and afterwards, to wit, on the 12th of *February*, 1833, the matters of such petition and schedule came on to be heard, and were duly examined into before and by the said Court, &c., and the said Court did then duly adjudge the defendant to be discharged from custody, and to be entitled to the provisions of the said act; and the defendant was accordingly then discharged from the custody aforesaid; and the defendant further saith, that no description whatsoever of the said debts or debt, or causes of action, or of any or either of them, so in the said declaration alleged to have been due from the defendant to the plaintiff, and to have accrued to the plaintiff in manner therein mentioned, or of the plaintiff, was contained

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or inserted in the said schedule so subscribed and filed as aforesaid, and that the said descriptions were and each of them was omitted from and out of the said schedule, by and with the full knowledge and consent, and by and through the contrivance and procurement, of the plaintiff. —Verification.

Replication to the latter plea—that the defendant, of his own wrong, and of his own sole instance and free will, and with intent to deceive and defraud the plaintiff in that behalf, omitted the said several debts and causes of action in the declaration mentioned, and all description of the same, from and out of his the defendant's said schedule; without this, that the said descriptions were omitted from and out of the said schedule by and with the full knowledge, &c., of the plaintiff; upon which issue was joined.

At the trial before Lord *Abinger*, C. B., at the *Middlesex* Sittings after *Michaelmas* Term, it appeared that the action was brought for an attorney's bill, alleged to have been incurred under the following circumstances:—

The defendant, who had been a guard of the *London & Devonport* mail, was discharged in consequence of a representation made to the *Post-office* by a gentleman named *Pitfold*, of his having insulted a lady who was a passenger in the mail. The defendant brought an action for libel against Mr. *Pitfold* for such representation, for the conduct of which the plaintiff, who was then an articulated clerk, supplied the funds, and recommended a Mr. *Rosher* as the attorney, who accordingly conducted it, as he stated, on the plaintiff's responsibility, and for and on the account of the defendant, and was paid by the plaintiff. On the part of the plaintiff, several letters from the defendant were also read, dated in *June* and *July*, 1831, urging the prosecution of the action, alluding to it as "his business," and stating that certain friends had offered to come forward with such money as might be wanted. The action against Mr. *Pitfold* was tried at the *Exeter Spring* Assizes, 1832,

when a verdict was found for the defendant, on the ground that the supposed libel was a privileged communication. On the part of the defendant, it was alleged, first, that that action was in fact the action of the plaintiff and not of the defendant, and was undertaken by the plaintiff gratuitously, on the chance of obtaining money from *Pitfold*; and several letters from the plaintiff were read, leading to such a conclusion. It appeared also, on the cross-examination of *Rosher*, that, after the defendant went to prison, the plaintiff called on him, *Rosher*, and told him that his name would not be inserted in the schedule, but that he, the plaintiff, would see his costs paid; and that at the time of making out the schedule, the plaintiff again told *Rosher* that he might look to him, and he would take care to provide him with funds: and it was contended, on the authority of the cases of *Howard v. Bartolozzi* (a), and *Tabram v. Freeman* (b), that, as it appeared that the debt was omitted from the schedule with the privity and by the procurement of the plaintiff, the defendant was entitled to a verdict on the special plea. The schedule itself, although it was in Court, was not formally put in and proved, but it was assumed throughout the cause that the plaintiff's debt was omitted from it. The Lord Chief Baron left it to the jury to say—*first*, whether the defendant was ever indebted to the plaintiff; and *secondly*, whether the plaintiff had been a party to the fraudulent omission of the debt from the schedule. And he told them that the fact of such omission, so long before the present action, (which was admitted *on the record*), coupled with the other evidence, afforded a strong presumption that no debt was ever due at all. A verdict having been found for the defendant—

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Humfrey now moved for a rule *nisi* for a new trial, on the ground of misdirection.—The schedule not having

(a) 4 B. & Adol. 555; 1 Nev. & M. 69.

(b) 2 C. & M. 451.

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been put in, there was no evidence of the omission of the debt; for upon this record the omission itself, as well as the procurement of the plaintiff, are in issue. There was therefore a misdirection in stating to the jury that the omission was admitted on the pleadings. [*Alderson*, B.—It seems to me a very reasonable argument to the jury to say—here are the two parties contending *quo animo* the debt was omitted; that admits that it *was* omitted in fact; not as a question arising on the pleadings, but an inference from the conduct of the parties before the jury.] It was not so put, but as a distinct admission, on the record, of a by-gone fact. Besides, the supposed admission on the record upon one issue was used as proof against the plaintiff on the other issue, and was coupled with the evidence applicable only to that other issue: but the supposed admissions on the face of one plea cannot, in law, be called in aid of the issue on another plea. But even if the omission is not denied on the pleadings; it is not *admitted* as a fact; it is only passed by as not being that fact on which the party chooses to take issue, and is not therefore to be taken against him as true. If it were otherwise, plaintiffs would be subjected to much hardship, being compelled to deny specifically some one allegation in a plea. Thus, in an action by the indorsee of a bill of exchange, if fraud appear in the transfer of it, the plaintiff is bound to prove consideration. If, then, the non-denial of a fraudulent transfer alleged in the plea is an admission of it as a fact, the defendant may always force the plaintiff to go into proof of consideration; and one and the same plea will effect that purpose in every case; unless indeed the plaintiff may reply *de injuriâ* (a). [Lord Abinger; C. B.—I believe we all agree that an admission in one plea cannot properly be used to prove or disprove another plea.

(a) But it is now decided that the replication *de injuriâ* is applicable to such a case. *Isaac v.*

Farrar, ante, 65; *Griffin v. Yates*, 2 Bing. N. C. 579.

Parke, B.—Every cause involving several issues is to be tried on each issue, as if they were several causes. Here you must try this case upon the issue on *nunquam indebitatus*, as if there were no other issue at all on the record. Thus, in an action of trespass, if the defendant pleaded not guilty, and also a justification of a right of way, the admission involved in such justification clearly could not be used to disprove the plea of not guilty.]

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LORD ABINGER, C. B., having read his notes of the trial—

PARKE, B.—I should have thought it fit to grant a rule, if the Lord Chief Baron had laid it down nakedly that the jury might look at one plea to support the other, and there had been no other admission to the same effect in the conduct of the cause. But it seems to me that there was such admission, and that the learned Judge refers to the record merely by way of illustration. Unquestionably, if this had not been so, I should have thought it a misdirection; because, whatever is admitted on any issue, I take it to be clear, is admitted only for the purpose of that issue.

ALDERSON, B.—I agree that we are not to take an admission in one plea as evidence on another. But if the parties have a particular controversy, and it seems plain that a certain fact is admitted between them in the course of that controversy, may not the jury, as men of common sense, draw the same conclusion as to that fact as if it were formally proved before them? I think they may, and that they are at liberty to draw it as to all the questions in issue in the cause.

GURNEY, B.—The only question in controversy was, by whom the omission was made; there was no question between the parties that it had been made in fact.

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LORD ABINGER, C. B.—That the debt was omitted was taken as a fact throughout by both sides. I fully admit that a fact admitted in one plea cannot be taken to prove or disprove another. But suppose, in the case of a justification of a right of way, put by my Brother *Parke*, it were proved, on the controversy upon the general issue, that the defendant came there and committed the trespass in assertion of his right of way, would not that be evidence on the other issue? In the present case, it appeared to me that the jury were satisfied that the plaintiff had the entire management of the cause, and that the omission was the plaintiff's, designedly made to benefit himself. If I had said that the omission was admitted by counsel on both sides, there could have been no objection; but because I said it was admitted on the record, that is the whole misdirection complained of: strictly speaking, no doubt it was admitted for the purpose of that plea, but not of the other.

Rule refused.

QUIGGIN v. DUFF.

Goods were forwarded by *K.*, a carrier, from *London* to *Liverpool*, addressed to the plaintiff, (at the *Isle of Man*), "care of *D.*, (the defendant), *Brunswick Street, Liverpool*." The goods were

CASE.—The declaration stated that the plaintiff delivered to the defendant two boxes of types, to be by the defendant taken care of, and shipped and forwarded from *Liverpool* to the *Isle of Man*, for reward to the defendant in that behalf; that the defendant accepted and received the goods for the purposes aforesaid, and took so little care of them, &c., that they were lost. Pleas—*first*, that

landed by *K.* on a public wharf at *Liverpool*, and on the same day notice was sent to the defendant of their arrival, and he signed the carrier's book, containing an acknowledgment that the goods in question had arrived for him (the defendant). He caused them also to be entered in the clearance and manifest of a steam-vessel about to sail for the *Isle of Man*.

It was proved also, that on former occasions, when goods had been brought by *K.* for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the boxes until six days after their arrival, when they were not to be found:—*Held*, in an action on the case against the defendant for negligence in not taking proper care of the goods, that there was evidence for the jury of a delivery to and acceptance by him.

the plaintiff did not deliver the goods to the defendant, nor did the defendant accept and receive the same; *secondly*, not guilty.

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At the trial before Lord *Abinger*, C. B., at the last *Spring Assizes* for *Liverpool*, the following facts appeared.

The two boxes in question were forwarded from *London*, on the 6th of *March*, 1836, by one of the boats of *Kenworthy & Co.*, carriers, to *Liverpool*, addressed to "Mr. *John Quiggin, Douglas*, care of Mr. *James Duff, Brunswick Street, Liverpool*." On the 12th of *March*, they were discharged at the Duke of *Bridgewater's Wharf, Liverpool*. The porter who landed them stated that he saw them there for three days; on the fourth the rain had washed off a portion of the direction; they were covered at night. On the sixth day after their arrival, a person came to ask for them, when they could not be found. On the 12th, the day of their landing, notice of their arrival was given by *Kenworthy & Co.* to the defendant, and a clerk in the defendant's office (at 6 p. m. on that day) signed the carrier's book, containing an acknowledgment that the goods had arrived for him (the defendant). The warehouseman and clerk of *Kenworthy & Co.* stated, that on former occasions they had received notices from the defendant to let goods, brought by them for him, remain on the wharf after their arrival till he sent for them. The clearance and manifest of the *Isle of Man* steamer, on the 18th of *March*, made out by the defendant's clerk, were read; they contained the name of the plaintiff, as consignee of two boxes of type; to the manifest was annexed a memorandum, stating that they were not sent, not being found on the wharf. The Lord Chief Baron was of opinion, on this evidence, that there was no proof of delivery to and acceptance by the defendant, and therefore that the declaration was not supported: if the defendant was guilty of any negligence, it was in not receiving the goods into his possession: no contract was

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shewn binding him to send for the goods. *Alexander*, for the defendant, having applied to his lordship to amend the declaration, which he refused, on the ground that it would render an entirely new frame of the whole pleadings necessary, urged that there was at all events evidence for the jury whether there had been a delivery or not; but the learned Judge stating that he should direct the jury to find for the defendant, the plaintiff submitted to be nonsuited.

In the following term *Alexander* obtained a rule *nisi* for a new trial, on the ground that it ought to have been left to the jury to say whether the defendant had not, by the acts proved in evidence, admitted the receipt of the goods.

Cresswell and *Crompton* now shewed cause.—The plaintiff has not made out either the contract or the breach of it alleged in the declaration. The plain meaning of the allegation in the declaration is, that there was an actual receipt of the goods by the defendant; but the proof relied on is merely of a kind of *constructive bailment*; whereas no bailment can properly arise without actual acceptance of the goods. The question is, whether the duty of *Kenworthy*, the carrier, had ended or not. The defendant had no means of knowing what the duty of *Kenworthy* was; the contract was between him and the plaintiff, and the plaintiff might have shewn what its terms were. Assuming, however, in the first place, that it was the carrier's duty to deliver to the defendant, he did not discharge that duty, for he left the goods on the open quay, the defendant having no person there to receive them. In *Selway v. Holloway* (a), the leaving goods at the inn where the defendant lodged, and where the carman was informed that he would find them, was held to be no delivery to him. [*Parke, B.*—Suppose in that case the defendant had given

(a) 1 *Ld. Raym.* 46.

a receipt for them?] Even that would not be a delivery; as far the plaintiff was concerned, it would be no more than a discharge from performance, not an actual performance, of the duty. *Wardell v. Mouryllian* (a) shews that a carrier is not discharged from his liability by delivering the goods at a wharf to which he has been in the constant habit of plying. So, a delivery on board ship is not sufficient, unless it be to some accredited officer. *Cobban v. Downe* (b). [Lord Abinger, C. B.—If the action had been framed on the defendant's negligence in not sending for the goods, would it not have been a good defence for him to say that he was not bound, under the circumstances, to send for them till the ship was ready to sail?] It is submitted that it would: he was bound to see that they were forwarded from *Liverpool* to the *Isle of Man*, but it was no part of his duty to keep them in the interval. He has merely notice of their arrival, but they are not put into his manual custody, or into any warehouse or place of business of his, and no contract appears on his part, on their being left on the quay, to take possession of them there. Suppose it were known to the plaintiff that *Kenworthy* went only to that wharf, and he directed the goods to be delivered to and taken care of there by the defendant, then it was part of *Kenworthy's* duty to give notice to the defendant to that effect; but the only notice he has is, that they have arrived. [Parke, B.—He is to receive and take care of them: he would have had a right to charge the plaintiff with the hire of a warehouse for taking care of them.] Then as to the signature in the book. It is assumed that the book contained a receipt, but that does not appear; all that was stated was, that the defendant signed *the book*. [Lord Abinger, C. B.—It seems to be only an acknowledgment that he had notice of the arrival of the goods.] If it is to be considered as an absolute receipt, suppose the

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(a) 2 Esp. N. P. C. 693.

(b) 5 Esp. 43.

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party brought the book after business hours, when the defendant could not send for them until the next day, he would nevertheless be responsible for their safe custody. *Kenworthy*, therefore, had not done enough to discharge himself, and the defendant certainly was not the agent of the plaintiff to discharge *Kenworthy* from any part of his duty. Suppose *Kenworthy* was the agent of the plaintiff to make a contract with the defendant, what was the contract? Can it be contended that it amounts to this, that the defendant contracted to acknowledge the goods in his custody from the moment of their arrival? No course of dealing was shewn by which such an inference could be supported. The person left in the counting-house would have no authority to bind the defendant to receive the goods, unless they were there to be received. [*Parke, B.*—If the subscription in the book amounts to an acknowledgment that he has taken charge of the goods, and exonerated the carrier, he cannot gainsay it after having altered the position of the parties; and their position is altered, because the carrier was thereby induced to take less care of the goods. Is it not, therefore, a question for the jury, *quo animo* the book was signed?] It is for the plaintiff to shew that: but upon the facts proved, it could not have been the intention of the defendant so to charge himself. The effect of it is, at most, that the defendant says, “I will go and look after the goods to-morrow, and I give you this acknowledgment that I have received this notice.” When the duty of either party ends or begins, must depend upon the contract; and it is the plaintiff’s fault if he makes or proves no specific contract. The entry in the ship’s manifest amounts to nothing; it is the constant course so to enter goods by anticipation.

Again, suppose it was *Kenworthy*’s duty not to deliver the goods, but to carry them to *Liverpool*, and give notice to the defendant, then it was part of his duty to take care of them for a reasonable time, so as to enable the

defendant to send for them. And even if *Kenworthy's* duty had ended, it is still a further step to say that the defendant's had necessarily commenced, no direction having been given to him. [*Bolland*, B.—It may perhaps be a question, on the evidence of the porter, whether there was not an intervening liability on the part of the Duke.] But even if the defendant's duty had begun, it does not follow that he entered into the particular contract declared on.

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Alexander, (*Cowling* with him), in support of the rule.—This nonsuit proceeded on the ground that the action was misconceived, and should have been for not accepting, there being no evidence of delivery and acceptance. It is submitted that that ruling was clearly erroneous. *Selwen v. Holloway* is quite inapplicable. If nothing appeared here but the delivery on the wharf, and the notice to the defendant, that case might apply; but the defendant's liability arises out of matter subsequent. The other cases cited are equally beside the present question. The signature of the book, and the entry in the clearance and manifest, amounted to a delivery to and acceptance by the defendant, and rendered him liable in this action. The signature is an admission of the receipt of the goods, as in every other case of delivery by a carrier. And it appeared that on previous occasions there had been a notice from the defendant to *Kenworthy* to let goods brought for him remain on the Duke's *Wharf* till sent for. There was therefore a reason why *Kenworthy* sent the notice only, instead of the goods themselves, to the defendant; and it saved him the expense of cartage and portage. It is said the signature is only an acknowledgment of notice that the goods have arrived; but that would be no protection to the carrier; unless it be an admission of the receipt of the goods, it is a mere useless formality. As soon as the carrier received back the notice, he would be exonerated, in the same way as if the goods had been

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delivered to the defendant himself. [He was here stopped by the Court].

LORD ABINGER, C. B.—You have now drawn the attention of the Court to what did not strike me as so material at the time of the trial—that is, the course of dealing between *Kenworthy* and the defendant; because it now appears, by *Foster's* (a) evidence, that the goods were left at the *Duke's Wharf* until the defendant sent for them; but I still adhere to my impression, that there was nothing in any contract proved or surmised, which necessarily implies that the defendant was bound to receive and keep the goods; but still, if he did receive them, and discharged the carrier, he received them with all their responsibilities, and it behoved him to see that they were in proper custody. There is the fact of *Kenworthy's* leaving the goods on the wharf for the defendant on former occasions, and therefore the defendant should shew that the wharf was the proper place for leaving the goods. I therefore think, although the case appeared to me slight, it ought to have gone to the jury on the question, whether, inasmuch as the defendant, by his notices to *Kenworthy*, had in this particular case made the Duke's premises his own place of receipt for the goods, he had accepted them; and whether, if so, that was a proper place for leaving the goods, so that the defendant took proper care of them. These are all questions for the jury, and therefore I think there must be a new trial.

PARKE, B.—I am of the same opinion. It is a question for the jury, whether, on the fact of the signing of the receipt in the book, and the other evidence in the cause, the defendant meant to discharge *Kenworthy*, and receive the goods himself: if he did, he is responsible for the due care of them until shipping them; and the question then

(a) The warehouseman of *Kenworthy & Co.*

is, whether leaving them on the wharf was due care on the part of the shipping agent. Having so received the goods, he ought to see that they are deposited in a reasonable and proper place. He has a right to charge a commission against his employer for taking care of them. The whole case seems to me to turn on the effect of the signature of the book, coupled with the other evidence;—whether the defendant meant thereby to receive the goods, and discharge *Kenworthy*. If he did, he was such an agent as is alleged in the declaration. That fact being first established, the second question is, whether the defendant was guilty of less than ordinary care in leaving the goods where they were left.

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BOLLAND, B.—I am of the same opinion. The only question in my mind was on the effect of the receipt. Until the notice was read from my Lord's notes, I should have thought that it ought to have been left to the jury, whether the Duke had the care of the goods, and it was his duty to cover them, and whether enough had been done on the part of the plaintiff to shew that the effect of the receipt was such as would bind the defendant; but *Foster's* evidence puts that beyond doubt, because it shews that the Duke's duty had ceased, and the defendant's begun, inasmuch as the defendant, when goods were brought to *Liverpool*, told *Kenworthy* to leave them on the Duke's *Wharf*, and he, the defendant, would attend to them. That would be an exoneration of *Kenworthy* after notice given to the defendant, and alters the effect of the receipt, and makes it clearly a question for the jury.

GURNEY, B., concurred.

Rule absolute (a).

(a) The cause was tried again before Parke, B., when a verdict at the Liverpool Spring Assizes, was found for the plaintiff.

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REX *v.* the Sheriff of MIDDLESEX, in a Cause of HAMMOND
v. BEAN.

A render by the sheriff, after the expiration of the body rule, although no bail have justified, entitles the sheriff to have an attachment against him set aside on payment of costs.

BAYLEY shewed cause against a rule which had been obtained by *Hughes* for setting aside an attachment against the sheriff on payment of costs. A *capias* issued against the defendant *Bean* on the 23rd of *December*, and he was arrested on the 29th; on the 2nd of *January* the sheriff was ruled to return the writ, and on the 6th to bring in the body; on the 11th that order was made a rule of Court, and an attachment issued against the sheriff; on the 8th the defendant was rendered, no bail having justified.—He contended, that after the expiration of the body rule, there could be no good render unless bail justified, the sheriff being in contempt by disobeying the body rule; and cited a case of *Stamford v. Berry* (a) in the Bail Court, where *Littledale, J.*, had so decided. [*Parke, B.*—What use is there in the justification?—it seems a mere unnecessary step.] If *Stamford v. Berry* be good law, the plaintiff has no benefit from the render, for he cannot keep the defendant in custody. [*Parke, B.*—Have you any authority for saying that it is not a good render? You would have been just in the same situation if bail had justified, and the defendant had then immediately rendered.] The rule of Court, *Trin. 33 Geo. 3* (b), after reciting that by the then practice of the Court of *King's Bench*, bail cannot render the defendant after a rule has been granted against the sheriff to bring in the body, before such bail have justified in open Court, provided that thenceforth bail should be at liberty to render the defendant, notwithstanding a body rule had issued, at any time *before* the expiration thereof. [*Bolland, B.*—In *Rex v. Sheriff of Middlesex* (c), it was held that the sheriff

(a) Not yet reported.

(b) 5 T. R. 368.

(c) 7 T. R. 529.

complied with that rule by putting in without justifying bail.] *Exch. of Pleas,*
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LORD ABINGER, C. B.—The judgment of my Brother *Littledale* does not appear to be supported by any other case decided by any Judge or by the Court, and the rule of Court referred to certainly does not support it; we have therefore less difficulty in dissenting from it, and it undoubtedly is inconsistent with principle. The rule must be absolute.

PARKE, B.—There must be some mistake as to the facts of that case.

Rule absolute on payment of costs.

GREGORY v. HARTNOLL.

INDEBITATUS *assumpsit* in the sum of 50*l.*, for money paid, and on an account stated.

Pleas—*First, non assumpsit. Secondly*, as to 34*l.* 2*s.* 4*d.*, parcel of the sum of 50*l.* in the declaration first mentioned, that the said sum of 34*l.* 2*s.* 4*d.*, parcel &c., was paid by the plaintiff to the use of the defendant, in manner thereinafter mentioned, and in no other manner and upon no other account, *viz.* as one-sixteenth part or share of the damages and costs recovered against the plaintiff in a certain action on the case which was prosecuted by *William Arter, William Arter the younger, and Thomas Arter*,

Assumpsit for money paid.
Plea—That the money was paid by the plaintiff to the use of the defendant, in manner thereinafter mentioned, and in no other manner, *viz.* as one-sixteenth part of the damages and costs recovered against the plaintiff, as owner of a vessel of which the

defendant was a part-owner to the extent of one-sixteenth share, for the loss of certain goods shipped on board the vessel, and which loss was alleged in the action to have happened through the negligence, &c., of the plaintiff, by his mariners and servants; whereas the loss complained of was not wholly caused by the negligence, &c., of the plaintiff, by his mariners and servants, but that the plaintiff, by his own personal and wilful misconduct, &c., contributed to the loss. The defendant pleaded further, that, although he was the legal owner of one-sixteenth part of the said vessel, yet he, the defendant, did not concur with the plaintiff and the other part-owners in the employment of the vessel in that voyage, but that the said voyage was undertaken and carried on for the profit and advantage of the plaintiff and certain other persons, separate and distinct from the defendant, and without his being concerned or in any way participating in the adventure. On special demurrer:—*Held*, that both pleas were bad, as amounting to the general issue.

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against the plaintiff, in the Court of our Lord the King, before the King himself, &c., wherein the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, complained against the plaintiff as the owner of a certain sloop or vessel called the *Commerce*, of which sloop or vessel the defendant at the time of the loss hereinafter mentioned was a part-owner to the extent of one-sixteenth part or share, in respect of the loss of certain goods shipped by the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, on board the said sloop or vessel, to be carried and conveyed in and on board the said sloop or vessel from the port of *Barnstaple*, in the county of *Devon*, to the port of *Bristol*, and which loss the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action alleged to have happened by and through the mere carelessness, negligence, and improper conduct of the plaintiff by his servants and mariners; and the defendant in fact says, that the said loss of which the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action complained, was not wholly caused by and through the carelessness, negligence, and improper conduct of the plaintiff by his mariners and servants, as in the said action alleged; but, on the contrary thereof, the defendant says, that the plaintiff, by and through his own personal and wilful misconduct and interference in and about the management and stowage of the said sloop or vessel, contributed to the said loss; and that the same happened by and through the personal and direct fault and wrong-doing of the plaintiff.—Verification. *Thirdly*, as to the said sum of 34*l.* 2*s.* 4*d.* in the introductory part of the second plea mentioned, that the said sum of 34*l.* 2*s.* 4*d.* was paid by the plaintiff for the use of the defendant, in the manner in the said second plea mentioned, and in no other manner, and upon no other account; and the defendant says, that although true it is that the defendant was the legal owner of one-sixteenth part or share of the said sloop or vessel, in the said second plea mentioned, at the time the said goods were shipped in and on board the said sloop or vessel, as in that plea mentioned, and continu

to be such legal owner at the time of the loss in that plea also mentioned; yet the defendant in fact says, that he did not join or concur with the plaintiff and the other part-owners of the said sloop or vessel in the employment of the said sloop or vessel on her said voyage from the port of *Barnstaple* to the port of *Bristol*, in the said second plea mentioned, but the said voyage was undertaken and carried on for the profit and advantage and at the risk of the plaintiff and certain other persons, separate, apart, and distinct from the defendant, and without his being concerned or in any way sharing or participating in the said adventure.—Verification.

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Special demurrer to the second and third pleas, assigning, amongst others, the following causes of demurrer, *viz.*—That the said pleas did not, nor did either of them, contain matter in confession and avoidance of the promise in the declaration, in so far as related to the sum of money in the introductory part of those pleas respectively mentioned, nor did either of those pleas give even a colourable right of action to the plaintiff; but each of them, on the contrary, set forth only matter in negation of the promise alleged in the declaration, and amounted therefore to the general issue *non assumpsit*; and that the second plea was, besides, contradictory and repugnant in its allegations, in this, that it commenced by alleging that the money therein respectively specified was paid to the use of the defendant, and proceeded with averments in direct contradiction thereto; and for that the said third plea does not shew any contract or other matter whereby the plaintiff was excluded from being concerned in and sharing and participating in the said adventure.

Crowder, in support of the demurrer.—The second and third pleas are bad, for not confessing and avoiding the causes of action alleged in the declaration. The plaintiff says, that the defendant is indebted to him for money paid by him to the defendant's use; the defendant alleges in

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against the plaintiff, in the Court of our Lord the King, before the King himself, &c., wherein the said *W. Arter*, *H. Arter* the younger, and *T. Arter*, complained against the plaintiff as the owner of a certain sloop or vessel called the *Commerce*, of which sloop or vessel the defendant at the time of the loss hereinafter mentioned was a part-owner to the extent of one-sixteenth part or share, in respect of the loss of certain goods shipped by the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, on board the said sloop or vessel, to be carried and conveyed in and on board the said sloop or vessel from the port of *Barnstaple*, in the county of *Devon*, to the port of *Bristol*, and which loss the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action alleged to have happened by and through the mere carelessness, negligence, and improper conduct of the plaintiff by his servants and mariners; and the defendant in fact says, that the said loss of which the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action complained, was not wholly caused by and through the carelessness, negligence, and improper conduct of the plaintiff by his mariners and servants, as in the said action alleged; but, on the contrary thereof, the defendant says, that the plaintiff, by and through his own personal and wilful misconduct and interference in and about the management and stowage of the said sloop or vessel, contributed to the said loss; and that the same happened by, and through the personal and direct fault and wrong-doing of the plaintiff.—Verification. *Thirdly*, as to the said sum of 34*l.* 2*s.* 4*d.* in the introductory part of the second plea mentioned, that the said sum of 34*l.* 2*s.* 4*d.* was paid by the plaintiff for the use of the defendant, in the manner in the said second plea mentioned, and in no other manner, and upon no other account; and the defendant says, that although true it is that the defendant was the legal owner of one-sixteenth part or share of the said sloop or vessel, in the said second plea mentioned, at the time the said goods were shipped in and on board the same sloop or vessel, as in that plea mentioned, and continued

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against the plaintiff, in the Court of our Lord the King, before the King himself, &c., wherein the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, complained against the plaintiff as the owner of a certain sloop or vessel called the *Commerce*, of which sloop or vessel the defendant at the time of the loss hereinafter mentioned was a part-owner to the extent of one-sixteenth part or share, in respect of the loss of certain goods shipped by the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, on board the said sloop or vessel, to be carried and conveyed in and on board the said sloop or vessel from the port of *Barnstaple*, in the county of *Devon*, to the port of *Bristol*, and which loss the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action alleged to have happened by and through the mere carelessness, negligence, and improper conduct of the plaintiff by his servants and mariners; and the defendant in fact says, that the said loss of which the said *W. Arter*, *W. Arter* the younger, and *T. Arter*, in their said action complained, was not wholly caused by and through the carelessness, negligence, and improper conduct of the plaintiff by his mariners and servants, as in the said action alleged; but, on the contrary thereof, the defendant says, that the plaintiff, by and through his own personal and wilful misconduct and interference in and about the management and stowage of the said sloop or vessel, contributed to the said loss; and that the same happened by and through the personal and direct fault and wrong-doing of the plaintiff.—Verification. *Thirdly*, as to the said sum of 34*l.* 2*s.* 4*d.* in the introductory part of the second plea mentioned, that the said sum of 34*l.* 2*s.* 4*d.* was paid by the plaintiff for the use of the defendant, in the manner in the said second plea mentioned, and in no other manner, and upon no other account; and the defendant says, that although true it is that the defendant was the legal owner of one-sixteenth part or share of the said sloop or vessel, in the said second plea mentioned, at the time the said goods were shipped in and on board the same sloop or vessel, as in that plea mentioned, and continued

to be such legal owner at the time of the loss in that plea also mentioned; yet the defendant in fact says, that he did not join or concur with the plaintiff and the other part-owners of the said sloop or vessel in the employment of the said sloop or vessel on her said voyage from the port of *Barnstaple* to the port of *Bristol*, in the said second plea mentioned, but the said voyage was undertaken and carried on for the profit and advantage and at the risk of the plaintiff and certain other persons, separate, apart, and distinct from the defendant, and without his being concerned or in any way sharing or participating in the said adventure.—Verification.

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Special demurrer to the second and third pleas, assigning, amongst others, the following causes of demurrer, *viz.*—That the said pleas did not, nor did either of them, contain matter in confession and avoidance of the promise in the declaration, in so far as related to the sum of money in the introductory part of those pleas respectively mentioned, nor did either of those pleas give even a colourable right of action to the plaintiff; but each of them, on the contrary, set forth only matter in negation of the promise alleged in the declaration, and amounted therefore to the general issue *non assumpsit*; and that the second plea was, besides, contradictory and repugnant in its allegations, in this, that it commenced by alleging that the money therein respectively specified was paid to the use of the defendant, and proceeded with averments in direct contradiction thereto; and for that the said third plea does not shew any contract or other matter whereby the plaintiff was excluded from being concerned in and sharing and participating in the said adventure.

Crowder, in support of the demurrer.—The second and third pleas are bad, for not confessing and avoiding the causes of action alleged in the declaration. The plaintiff says, that the defendant is indebted to him for money paid by him to the defendant's use; the defendant alleges in

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the second plea, that the money was paid to his use in a particular manner only, and he then states certain facts, which go to shew that the money never was paid to the defendant's use at all, which amounts in effect to the general issue. The law in this respect has not been altered by the new rules as to pleading, and a plea which amounts to the general issue is still bad on special demurrer. *Solly v. Neish* (a). [*Parke, B.*—The second plea appears to admit all the facts from which the liability arises, but alleges that the loss arose from the plaintiff's own personal negligence. The third plea appears clearly to amount to the general issue only, for it alleges in effect that they were not parties in the adventure. The plaintiff does not state the facts from which the implied contract arises, but he must prove that the money was paid under such circumstances as to render the defendant liable.] *Crowder* was then stopped by the Court, who called upon—

Montagu Smith to support the pleas.—*First*, the pleas demurred to do not amount to the general issue. But, *secondly*, if they do since the new rules as to pleading, that is no objection. The second plea confesses the facts from which a contract may be implied ; but alleges, as an answer, an additional fact which avoids it. The facts admitted on the plea raise an implied contract, and the defendant is compelled to rebut the legal inference to be drawn from those facts, by shewing special matter in answer to it. The defendant has admitted that he and the plaintiff were part-owners of the vessel; that a loss has occurred; that an action has been brought against them, and damages recovered; from which facts the law would raise an implied contract on the part of the defendant to pay his proportion; but the defendant avoids that, by shewing that the loss was occasioned by the defendant's negligence. He admits a *prima facie* case for the plaintiff, and

(a) 2 C. M. & R. 355.

avoids it by a suggestion of new facts which afford him a defence. [*Parke, B.*—It really comes to this question—what are the facts which the plaintiff must prove, in order to maintain the action?] The case of *Roffey v. Smith* (a), it is submitted, is an authority to shew that, since the new rules, such a defence as the present must be specially pleaded. [*Parke, B.*—In *Cousins v. Paddon* (b), this Court was of opinion that the ruling in that case could not be supported.] But even admitting that this defence could have been given in evidence under the general issue, still it may be specially pleaded, as there are many instances where a defendant has the option of giving his defence in evidence under the general issue, or of putting it on the record. *Bacon's Abr. Pleas, G. 3; Skin. 362; Birch v. Wilson* (c); *Carr v. Hinchliff* (d); and *Maggs v. Ames* (e).

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Crowder, in reply.—This plea is clearly not good as a plea in confession and avoidance, for it omits to confess the most material fact,—namely, that the loss was occasioned by the negligence of the mariners.

LORD ABINGER, C. B.—If it be said, that the facts from which the promise is to be implied are admitted by this plea, that which is afterwards stated is inconsistent with the previous admission; for it goes to shew that there could be no such promise at all. It is very important to distinguish between the facts alleged by the plaintiff, and the evidence of those facts. It does not necessarily follow, because a party admits the facts, that he thereby also admits the inference which is to be drawn from them.

PARKE, B.—In order to support this action, the plaintiff is bound to shew that the money has been paid by him under such circumstances as that the law would

(a) 6 Carr. & P. 662.

(b) 2 C. M. & R. 556.

(c) 2 Mod. 274.

(d) 4 B. & C. 547; 7 D. & R. 42.

(e) 4 Bingham 470; 1 M. & P. 294.

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raise an implied promise on the part of the defendant to repay it him. This the defendant might dispute under the general issue. This second plea does not admit that the money was ever paid by the plaintiff to the defendant's use; and if so, it amounts to the general issue. Nothing can be matter of confession and avoidance, in answer to this declaration, which does not admit that at one time there was money paid to the defendant's use, and then avoid it by shewing nonpayment, or that the contract was illegal, or some other of the cases embraced by the new rule. Here there is an allegation of some facts, which amount to a *denial* of the inference which the plaintiff proposes to draw from the facts alleged in his declaration. The same observations apply to the third plea.

BOLLAND, B.—The second plea admits that the defendant was a part-owner, and that the plaintiff has paid the loss; but when it comes to the material part—namely, the negligence of the plaintiff's servants—it states merely that it was so alleged in the action, and goes on to aver the contrary. The confession is, therefore, not sufficiently perfect to render this a good plea. As to the third plea, there can be no doubt that it amounts to the general issue.

GURNEY, B., concurred.

Judgment for the plaintiff.

MARSHALL v. WILLIAM WHITESIDE, and ELEONORE
VICTORINE, his Wife.

Where there are
several counts
for several
causes of action,
or several
breaches are as-

signed in covenant, the defendant may plead payment into Court of one entire sum, in satisfaction of all the counts or breaches.

COVENANT.—The declaration stated, that, heretofore, and whilst the said defendant *Eleonore Victorine* was sole and unmarried, to wit, on the 22nd of *February*,

1828, by a certain indenture then made between the plaintiff of the one part, and one *Arabella Gaudard* and the said defendant *Eleonore Victorine*, of the other part, the said plaintiff, for the consideration therein mentioned, did demise and lease unto the said *Arabella Gaudard* and the said defendant *Eleonore Victorine*, their executors, &c., a certain messuage or dwelling-house, tenements and premises, with the appurtenances particularly mentioned and described in the said indenture, to have and to hold unto the said *A. Gaudard* and the said defendant *E. Victorine*, from the 25th of *March* then next, for the term of twenty-one years from thence next ensuing, determinable at the end of the first seven or fourteen years, on giving six calendar months' notice before the expiration of such first seven or fourteen years. The declaration then set forth joint and several covenants on the part of the said *A. Gaudard* and *Eleonore Victorine*, that they would, within every third year during the continuance of the term, paint the whole outside wood and iron work of the said messuages and premises with two coats of paint; and also colour the whole of the outside stucco-work of a uniform stone colour, within every third year during the continuance of the term; and also within every seventh year during the continuance of the term, paint with two coats of paint in oil the inside of the said messuage and premises. They also covenanted to repair, and keep in repair, the premises demised, during the continuance of the term, and at the end or other sooner determination thereof, to deliver them up in good repair and condition. The declaration then averred, that the lessees entered; that, on the 1st of *January*, 1834, the said defendant *Eleonore Victorine* and the said defendant *William* intermarried, and that they the said *A. Gaudard* and the defendants did, more than six months before the expiration of the first seven years of the term, give to the said plaintiff notice in writing to determine the lease, and that they gave up possession accord-

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ingly, which was accepted by the plaintiff. The plaintiff then assigned breaches of the three first-mentioned covenants, alleging that the said *A. Gaudard* and *Eleonore Victorine*, whilst she was sole and unmarried, and the said *A. G.* and the said defendants after the intermarriage, had not performed those covenants; and as to the covenants to repair during the term, and yield up the premises in repair at the expiration of it, that they did not sufficiently repair the premises during the term, nor did they deliver them up in such repair at the determination of the term. To the three first breaches the defendants pleaded, that the said *A. G.* and the said defendants did perform the covenants on which those breaches were assigned, traversing the breaches alleged in the declaration. To the fourth and last breaches they pleaded as follows:—"that the said plaintiff ought not further to maintain her action in that behalf, because the said defendants now bring into Court the sum of 90*l.*, ready to be paid to the said plaintiff: and the said defendants further say, that the said plaintiff hath not sustained damages to a greater amount than the said sum of 90*l.* in respect of the breaches of covenant fourthly and lastly above assigned."

Special demurrer to all the pleas—assigning for cause, that the issues tendered by the three first pleas were too large, and that the plea to the fourth breach should have stated and shewn how much and what part of the said sum of 90*l.*, which the said defendants brought into Court, was intended to be brought into Court and paid on account of the damages sustained by the plaintiff by reason of the breaches fourthly above assigned, and how much and which part of the said sum of 90*l.* to the breaches of covenant by the plaintiff lastly above assigned; but by the defendants' bringing the money into Court, and paying the same in respect of the whole of the breaches of covenant by the plaintiff fourthly and lastly above assigned, the plaintiff could not safely reply to the plea, or take issue thereon.

Ogle, in support of the demurrer.—The objection to the three first pleas is, that the issues tendered by them are too large. The plaintiff by his declaration complains of the breaches of those covenants, both before and after the marriage of the defendants; and therefore, as those pleas only allege generally that *Arabella Gaudard* and the defendants performed the covenants, they are not complete issues, and the issues thereby tendered are different from those tendered by the plaintiff. The last plea is bad for not specifying how much money was paid in on each of the two last breaches; that is, how much on the breach for not repairing during the term, and how much on the breach for not delivering up the premises in repair. This payment into Court generally may put the plaintiff into a difficulty; because, although there may be enough to cover the amount due for both those breaches, yet enough may not have been paid in, or intended to be paid in, on one of them. If the money were paid in separately, the plaintiff might take out of Court the money paid in on one breach, and proceed no further as to that. But as it now stands, he must go down to trial prepared to prove both breaches. In a recent case in the *King's Bench*, *Mee v. Tomlinson* (a), where the declaration demanded several sums of money, on distinct and separate debts, and the defendant pleaded payment generally, not saying how much as to one, and how much as to the others; it was held to be ill, and that he ought to have specified how much he paid in respect of each debt.

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PARKE, B.—When the Court of *King's Bench* decided that case, the judgment of this Court in *Jourdain v. Johnson* (b) was not known. I have had some conversation with Mr. Justice *Patteson* on this subject, and he said he was dissatisfied with that decision. He is now

(a) M. T. 6 Will. 4.

(b) 2 C. M. & R. 564.

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of opinion, that where the plea amounts to an accord and satisfaction, it may be right to plead it separately to each particular count; but where there is a plea of payment of money into Court, it need not be pleaded to each count, but may be pleaded generally to the whole declaration. The practice formerly was, to allow money to be paid into Court upon the whole declaration. I do not see what inconvenience the plaintiff has sustained; if too small an amount has been paid in, he will be entitled to recover. The rule (a) only obliges the defendants to pay in enough on both the breaches.

The Court being of opinion that the objection to the other pleas was valid, gave both parties

Leave to amend, without costs.

Crowder appeared in support of the pleas.

(a) R. 19, H. T. 4 Will. 4.

ADAMS v. MARY ANN BINGLEY, Administratrix of
RICHARD BINGLEY, deceased.

In February,
1829, *A.* and *B.*
were in partner-
ship as brewers,

ASSUMPSIT on a promissory note for 300*l.*, dated the 10th of February, 1829, made by the defendant's intestate, *D.* being interested only as executor of a former partner, on behalf of his infant son. *B.* advanced 300*l.* to *D.* out of the funds of the firm, and took his promissory note for that amount, payable to the order of *B.* on demand. In November, 1829, *C.* purchased the interest of the deceased partner, and the concern was thenceforth carried on by *B.* and *C.*, and a notice was then inserted in the *Gazette*, signed by *A.*, *B.* and *C.*, of the dissolution, and that all persons indebted to the firm should pay their debts to *B.* and *C.* *A.* became a large creditor of the firm, and in April, 1831, the note in question was indorsed by *B.*, to *B.* and *C.*, and by them to the plaintiff, as part security for advances made by him. In August, 1831, *B.* obtained from *D.* his acceptance for 300*l.*, as in lieu of the promissory note, representing that *A.* wished for a fresh security, and undertaking to get back and deliver up the note, but which was never done. *B.* and *C.* became bankrupts. The bill of exchange was subsequently paid by *D.* to *A.*'s attorney, but there was no evidence why it came into his hands.

In an action by *A.* against *D.* (commenced in 1835) on the promissory note:—*Held*, that the plaintiff was entitled to recover, unless the jury could infer from the circumstances of the case that he knew that the bill of exchange was given for the same debt as the promissory note.

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tate, payable on demand to the order of *George Wyatt*, for value received, indorsed by him to Messrs. *George Wyatt* and *Henry Thompson*, and by them to the plaintiff: with counts for interest, and on an account stated. *First* plea, as to the first count, that after the making of the said note and of the said indorsements thereon, the said *Wyatt* and *Thompson*, as the agents of the plaintiff and on his behalf, to wit, on the 19th of *August*, 1831, obtained and procured from the said *R. Bingley* in his lifetime, a bill of exchange for 300*l.*, accepted by him, and payable three months after date, in lieu of and in substitution for the said promissory note in the declaration mentioned; that the said *R. Bingley* afterwards, and after the said bill of exchange became due and payable, to wit, on the 8th of *June*, 1832, paid to the plaintiff the said sum of 300*l.* in the said bill of exchange mentioned, together with 7*l.* 10*s.* for interest thereon, in full satisfaction and discharge of the said promissory note in the declaration mentioned.—*Verification.* *Second* plea, as to the residue of the declaration, *non assumpsit*. Replication to the first plea, that the said *Wyatt* and *Thompson* were not the agents, nor was either of them the agent, of the plaintiff, nor had they or either of them any authority whatsoever from the plaintiff to obtain or procure, or accept from the said *R. Bingley* the said bill of exchange in the plea mentioned, in lieu of or in substitution for the said bill of exchange in the declaration mentioned: and issue thereon.

At the trial before Lord *Abinger*, C. B., at the *London* *Sittings* after last *Trinity* Term (a), the facts appeared to be in substance as follows:—

Henry Wyatt, deceased, carried on business in partnership with his two sons, *George Wyatt* and *Henry Early Wyatt*, as brewers, in *Portpool-lane*, for some time before and until his death in the month of *July*, 1826. By

(a) A question arose at the trial, which party ought, on these pleadings, to begin. His Lord-

ship ruled that the defendant was entitled to begin.

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his will he appointed *Edmund Marks* and the plaintiff, Mr. *Samuel Adams*, his executors, and bequeathed to them his surplus pecuniary capital embarked in his business, with directions to concur in carrying on and managing it in conjunction with his sons, on behalf of another son, then a minor. The business was accordingly so carried on until the 1st of *January*, 1828, when *Henry Early Wyatt* retired from the firm, and the following notice was inserted in the *London Gazette*:—

“ Notice is hereby given, that the partnership formerly subsisting between *Henry Wyatt* the elder, (now deceased), and his two sons, *Henry Early Wyatt* and *G. Wyatt*, of *Portpool-lane, Gray's-inn-lane*, brewers, under the firm of *Wyatt & Sons*, and the partnership carried on since his death by us, the undersigned, have been dissolved by mutual consent on the 1st day of this instant *January*, so far as regards the said *H. E. Wyatt*, who retires from the business: and all persons indebted to either of the said firms are to pay their debts to the said *George Wyatt*, and all debts due from the said firms will be paid by the said *George Wyatt*. As witness our hands this 1st of *January*, 1828.

“ *Henry Early Wyatt*,

“ *George Wyatt*,

“ *Edmund Marks*,

“ *Samuel Adams*,

} “ Executors of *Henry Wyatt*, deceased.”

The business continued to be carried on by *George Wyatt* alone, with the concurrence of the executors, under the firm of *George Wyatt & Co.*, until the 6th of *November*, 1829, when *Henry Thompson* was taken into the partnership, having purchased the interest of the testator, *Henry Wyatt*, and the following notice was then inserted in the *London Gazette*:—

“ Notice is hereby given, that the brewery business lately carried on by the undersigned *George Wyatt*, with the concurrence of the undersigned *Samuel Adams* and *E.*

Marks, as executors named in the last will and testament of *Henry Wyatt*, Esq., deceased, on behalf of his son, *William Wyatt*, at the established brewhouse in *Portpool-lane, Gray's-inn-lane, London*, under the name, style, and firm of *George Wyatt & Co.*, has this day ceased and determined; and that the same will in future be carried on by the said *George Wyatt* and the undersigned *Henry Thompson*, in co-partnership, at the said brewhouse in *Portpool-lane* aforesaid, under the name, style, and firm of *Wyatt & Thompson*. All persons indebted to the said concern are to pay their debts to the said Messrs. *Wyatt & Thompson*; and all persons having any claims or demands upon the said concern are to send their respective accounts thereof to the said Messrs. *Wyatt & Thompson*. Dated this 6th day of *November, 1836*.

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“ *George Wyatt*,
“ *Samuel Adams*, } “ Executors of *Henry Wyatt*,
“ *Edmund Marks*, } Esq., deceased.”
“ *Henry Thompson*.

George Wyatt, being called for the defendant, stated, that previously to the dissolution in 1828, and subsequently, the intestate *Bingley* (who was a publican in *Somers-town*) was a customer of the several firms; and that in *February, 1829*, he applied to the witness for the loan of 300*l.*, to enable him to open a second public-house, which the witness advanced to him out of the money of the firm, and took the promissory note in question as a security. The witness apprized the plaintiff of the loan. The note remained in *Wyatt's* possession until *August, 1831*, in which month *Thompson* having informed him that the plaintiff wanted to have a fresh note drawn on *Bingley*, and to do away with the old security, he, *Wyatt*, called on *Bingley*, and told him they (the firm) wished to have a fresh note instead of the old one. *Bingley* assented, and bought a stamp, and accepted the bill mentioned in the plea. *Wyatt* told him the plaintiff would bring the old

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note to town the next morning, and *Thompson* would send over to him ; and gave a written undertaking to deliver it up. The witness stated, that *Thompson* had told him that he had given the note to the plaintiff. It was proved on the plaintiff's part, that he was a large creditor of the firm, both of *Wyatt & Co.* and of *Wyatt & Thompson*; that in *April*, 1831, *Wyatt & Thompson* being indebted to Messrs. *Barclay & Co.*, their bankers, in the sum of 5,000*l.*, they applied to the plaintiff to become surety for half the amount, on a deposit with him of certain promissory notes which Messrs. *Barclay & Co.* held belonging to the firm, together with several others then in the hands of *Wyatt & Thompson*, of which the note, the subject of the present action, was one. The plaintiff accordingly drew bills on *Wyatt & Thompson* to the amount of 2,500*l.*, which he indorsed to *Barclay & Co.* on receiving the several promissory notes above mentioned, and the note in question was then indorsed to him by *Wyatt & Thompson*. In *December*, 1831, *Wyatt & Thompson* became bankrupts, and the plaintiff proved debts under the fiat to the amount of 27,000*l.* On the plaintiff's making application to *Bingley* for payment of the note, he stated that he had been defrauded out of his acceptance, given in lieu of it, by *Wyatt & Thompson*, who had represented to him that they were the holders of the note. The bill of exchange was paid by the defendant in *June*, 1832, to the plaintiff's attorney.

The Lord Chief Baron, in summing up, expressed an opinion that the notice of *November*, 1829, authorized any person then indebted to the firm to settle with *Wyatt & Thompson*; and that the plaintiff, being in fact a partner when the promissory note was given, and having signed that notice, was bound by all the equities against *Wyatt & Thompson*, and constituted them his agents for the purpose of receiving from the defendant the bill of exchange given in substitution for the note; and that the

subsequent indorsement of the note to the plaintiff was, under the circumstances, a fraud on *Bingley*. The jury found for the defendant.

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Erle, in the following term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Bompas, Serjt., now shewed cause.—The defendant was entitled, on the facts proved, to the verdict found for him. It is clear, from the notice of *January* 1828, that the only change then made in the firm was the retirement of *H. E. Wyatt*. The plaintiff, therefore, was a partner at the period of the loan to the defendant in 1829. That was not a payment secured by a note which was to go into circulation in the ordinary way: it was a mere loan of money to enable the defendant to carry on business, with a deposit of the note in the hands of the firm, as a private security between the parties. Had the firm indorsed it over, no doubt the indorsee might have sued the defendant on demand; but, as between the parties to the transaction, it is in fraud of the understanding between them that the plaintiff, one of those parties, should be allowed to enforce the note against the defendant. The debt was the money lent; the note was a mere voucher, such as is given in the usual way of business as between banker and customer. Then, on the dissolution of the partnership, notice being given to pay the debts due from him to *Wyatt & Thompson*, and no reference being made to the note as a distinct security, this money remained as a debt to the firm as before. The indorsement to the plaintiff is in contravention of the understanding between all the parties, and ought not to bind the defendant. The partnership was dissolved only as to future transactions; the three remained partners as before, in respect to past transactions. [*Parke*, B.—They remain partners in the debt until it is parted with by a transfer of the negotiable security to

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somebody else.] It does not follow, because a party has a negotiable instrument in his hands, that he has an unlimited right to negotiate it. *Collins v. Martin* (a) may be referred to as an authority to the contrary; but the only effect of that case is to shew that a *third party* might sue the defendant on the note, which is not denied. [*Parke, B.*—The notice to pay debts to *Wyatt & Thompson*, means debts which shall become payable during their partnership. This was a debt previously existing, and assignable by indorsement. That seems to me to pass the property, unless you can shew that the assignment was fraudulent. *In itself* such assignment was no fraud. Lord *Abinger, C. B.*—The assignment, without any notice to the defendant, seems to me very like a fraud.] The contract in substance was, that the note should not be indorsed over; and it was a fraud upon the defendant to do so without any communication to him. It was in effect indorsed by *Adams* to himself. *Wyatt* obtained the acceptance from the defendant as *Adams's* agent, and the latter cannot take advantage of the security so obtained, and then deny the authority. [*Parke, B.*—The sum of your argument is, that the negotiability of a bill of exchange is affected by a previous fraud of which the holder knows nothing.]

Erle and Chandless, contra.—The form of the issue raised on the pleadings is most material to the present question. The plea admits that this note is the separate and individual property of the plaintiff, and admits also the right to indorse to him. Now the only question at the trial was, how far the notices given in evidence shewed an authority in *Wyatt & Thompson* to receive the substituted bill in lieu of the note. But if the note be admitted to be the sole property of the plaintiff by indorsement, how can the notice operate as an authority to receive payment of it, which is a debt

(a) 1 Bos. & P. 648.

due, not to the partnership, but to the plaintiff solely and individually? The form of the plea, therefore, of itself furnishes a sufficient answer to the argument for the defendant. But even if that be otherwise, the notice clearly means no more than that all persons, *while indebted to the firm*, must pay their debts to *Wyatt & Thompson*. But when a party gives a promissory note or other negotiable security, he makes himself liable in all the modes in which a party can be liable on such an instrument. It indicates on the face of it that the party who signed it knew he was giving a security which was to be transferable. Even had there been a clear agreement not to transfer it, such agreement could not have been set up against the written contract contained in the note. If indeed the note had been in the hands of the partnership when the defendant ultimately paid the money, no doubt, as against the partnership, it would have been satisfied; but at that time it had become a debt no longer due to the partnership. [Lord Abinger, C. B.—My difficulty is, whether the plaintiff does continue, *quoad* this debt, a partner. He is privy to the original consideration for the note; that privy does not cease by the assignment to him: then, has he a right, by an arrangement with the other partners, to alter the relation of the debtor to the firm?] Even if he continues a partner as to the *debt*, he does not as to the *security*. The indorsement is in law a notice to all the parties liable upon the bill, of its transfer. It is so considered in the bankrupt law; although on the assignment of all other debts (all debts being considered equally assignable in bankruptcy) actual notice must be given of the transfer to the debtor. The party should take care, when he pays his money, to get back his security.

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Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said—On consideration, I am

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not prepared to say that I was right in going so far as to state that the indorsement to the plaintiff was fraudulent. If I had stated it as a question for the jury, whether they could presume a fraud, I am not sure that I should have been dissatisfied with the verdict. If the plaintiff was a *bond fide* indorsee, I agree that he might sue upon the note. At the same time, I think it would be a very considerable question for the jury, whether he did not know the circumstances as to the substitution of the bill of exchange, or ought not to have known them. I certainly put it too strongly, that the payment to one was the payment to all. There must therefore be a new trial.

PARKE, B.—It appears to me that the plaintiff was the *bond fide* indorsee of the note; that there was no legal obligation on *Wyatt & Thompson* not to sue upon it, however they might have been bound in honour not to do so; and that the plaintiff, who took that note by indorsement for a valuable consideration, after the dissolution of the partnership, cannot be in a different position to theirs; he therefore, being a *bond fide* indorsee, might also sue upon it. The notice given on the dissolution of the partnership extended only to such debts as were partnership debts at the time; *Wyatt & Thompson*, therefore, had no power to receive the amount of this note, because it was no longer a partnership debt when it had been indorsed over to the plaintiff for a valuable consideration. It may however be a question, whether, as the precise amount of the note which was originally given—and which the plaintiff must be taken to have known was given—for a loan was afterwards received in a bill by *Wyatt & Thompson* and handed over by them to the plaintiff, the plaintiff might not have inferred that the acceptance was given way of exchange for the promissory note. If he reason to know, from the similarity of the amount of the notes, and from the circumstances in which *Bingley*

was placed, (he never having paid the original sum advanced to him on the security of the note), that both were for the same debt, then the plaintiff could no longer sue on the promissory note. That point, therefore, must be submitted to the jury.

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BOLLAND, B., concurred.

Rule absolute.

GUNTER v. M'TEAR and Others.

ASSUMPSIT for the breach of an agreement, by which the defendants had engaged the plaintiff to sail as supercargo in a ship they were about to send out to *Canton*, in order to form a commercial establishment there, and for discharging him from their service. The defendants pleaded, *first*, the general issue; *secondly*, that the plaintiff had been guilty of immoral, corrupt, and improper conduct, which rendered him unfit for the employment mentioned in the declaration, and which did not come to the ears of the defendants until after the making of the agreement, to wit, on &c., when they discharged the plaintiff from further employment under the agreement. The plaintiff took issue on this plea.

The affidavit on which to ground a motion for a commission to examine witnesses abroad, must either specify the names of the witnesses proposed to be examined, or in some other way describe them.

Cowling, on a former day in this term, had obtained a rule to shew cause why a commission should not issue for the examination of witnesses in *Jamaica*. The affidavit on which he moved, stated that the deponent had received information that the plaintiff had been guilty of criminal conversation with a married lady in *Jamaica*, and that her husband had in consequence shot himself; and then went on to allege "that the issue to be tried between the plaintiff and the defendants, under the pleadings in this action, will be, whether or not the said plaintiff was guilty

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of such immoral and improper conduct as aforesaid; and that several persons now residing in the said island, but whose names are at present unknown to this deponent, are cognizant of the facts before stated, and are material and necessary witnesses; that they are all resident in the said island, and will not, as he believes, be in *England* before the trial."

Butt shewed cause.—This affidavit is too vague, and does not shew to the Court sufficient ground for granting the commission. It neither states the name of the party with whom the act is alleged to have been committed, nor the names of the witnesses whom the defendants propose to examine.

Cowling was heard in support of the rule.

LORD ABINGER, C. B.—As this deponent does not know who the witnesses are, how can he know whether they will come to *England* before the trial or not? This seems more like an application for a commission to inquire for witnesses, than to examine them. I never knew an application for a commission to examine witnesses, where the affidavit did not either specify the names of the witnesses to be examined, or describe in some way who they were. I do not say that it is essential that their names should be stated: and if the deponent had sworn to the witnesses as being such and such persons, but whose names he had forgotten, the affidavit might have been sufficient.

PARKE, B., BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

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GODSON had obtained a rule to set aside a warrant of attorney given by the defendant in this cause, on the 1st of *August*, 1835, on the ground that he was an infant at the time it was given.

The Court refused to set aside a warrant of attorney, dated the 1st of *August*, 1835, on the affidavit of the defendant, that when he gave it "he was an infant of the age of twenty years or thereabouts," together with proof of his register of baptism, dated in *September*, 1815.

Erle shewed cause, and contended that there was no sufficient proof of the infancy. The defendant himself had made an affidavit, that at the time when the warrant of attorney was given he was "an infant of the age of twenty years or thereabouts;" and the only proof adduced in support of that statement was a copy of his register of baptism, dated the 3rd of *September*, 1815 (*a*). Now, the infant could not know his own age, and the register was no evidence of the time of his *birth*. On the other hand, it was sworn that when the warrant of attorney was given he was carrying on trade as a chemist, and it was given for a debt contracted in the course of that trade: he had therefore held himself out to the plaintiff as a person of full age.

Godson, in support of the rule, urged that the affidavits on the part of the defendant, being altogether uncontradicted, sufficiently shewed that he was under age when the security was given.

LORD ABINGER, C. B.—I think this rule ought to be discharged. It is plain the party himself could not know his own age accurately; and this is a case in which the plaintiff could not be expected to swear directly the

(*a*) There was some question whether the identity of the defendant with the party mentioned in the register was sufficiently made out; but the Court did not decide on that ground.

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other way. The opening of a shop, and carrying on trade, gave a creditor a right to consider the party *prima facie* as of full age to make contracts for himself. We ought not to allow his statement the same effect as if it were an affidavit of a fact which the other party was capable of answering: and I do not very well see how he could be indicted for perjury on this affidavit; if he is twenty-two or twenty-three, he is also twenty; and he might very well set up the defence that he did not know his age. Then the case stands on the naked evidence of a register, which is altogether inconclusive. It is clear there is nothing which would amount to proof of infancy before a jury, and we ought not to act on evidence short of that.

PARKE, B.—I agree in thinking that the infancy is not sufficiently made out to induce us to relieve this defendant.

BOLLAND, B., concurred.

Rule discharged, with costs.



The Duke of NORFOLK v. LEICESTER.

The affidavit of the existence of the debt, on which to ground a motion for a *scire facias* to revive the judgment, ought either to be made by the plaintiff himself, or by some person who was his attorney at the time of the judgment.

IN this case, *Tremenhere* moved for a *scire facias* to revive a judgment more than ten years old, on an affidavit of the existence of the debt by the plaintiff's attorney; and which stated that "he was and is" such attorney, but it did not state how long he had been so.

PARKE, B.—If there be not an affidavit made by the plaintiff himself, there ought to be one by some person who was his attorney at the time that the judgment was obtained, and still continues to be so.

Motion refused.

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FOSBROOKE v. HOLT.

THIS was an action of trespass brought against a justice of the peace, in which the plaintiff, before issue joined, had obtained a rule to discontinue on payment of costs. The Master, on taxation, on the 3rd of *December* last, had taxed the defendant single costs only, and the allowance of such costs was obtained on the 4th of the same month. The defendant then took out a summons calling upon the plaintiff to shew cause why he (the defendant) should not be allowed double costs; but on the matter being heard before *Alderson*, B., he refused to interfere. On the 8th of *December* the plaintiff's attorney offered to pay the amount of double costs taxed, to avoid the risk of a motion, which the defendant's attorney refused to receive, unless the plaintiff's attorney would consent to a Judge's order allowing a suggestion to be entered on the roll, which the latter refused to do, as a second action was brought, and the suggestion might be used adversely at the trial. *Cresswell* having on the 23rd of *January* obtained a rule to shew cause why a suggestion should not be entered on the roll, and why the Master should not review his taxation,

A justice of the peace is not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs.

Semble, That a justice of the peace is entitled to double costs on discontinuance before trial, under the 7 *Jac.* 1, c. 5.

Hoggins now shewed cause, and contended, *first*, that the defendant was not entitled to double costs at all; and *secondly*, that he was not entitled to enter any suggestion on the roll. The statute 7 *Jac.* 1, c. 5, provides, that if any action shall be brought against any justice of the peace, &c., for anything done by him by virtue of his office, he may plead the general issue, and give the special matter of defence in evidence; and that "if the verdict shall pass with the defendant in any such action, or the plaintiff therein become nonsuit, or suffer any discontinuance thereof, in every such case the Justice or Justices, or such other Judge before whom the said matter

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shall be tried, shall, by force and virtue of this act, allow unto the defendant his double costs, which he shall have sustained by reason of his vexation in defence of the said action, for which the said defendant shall have like remedy as in other cases where costs by the laws of this realm are given to defendants." The statute says, that the Judge shall allow double costs; therefore it applies only to a case where the matter is tried in Court, or where there is a discontinuance in Court after the cause has been tried, and not to a case where issue has not been joined, as in the present instance. *Davenish v. Mertius* (a) may be cited on the other side, but it is no authority for the present application for them. The Court there directed the Master to allow the double costs as part of the terms of granting the discontinuance, but they discharged the rule as related to the suggestion. Besides, as the discontinuance in the present case had already been allowed, the defendant is too late in his application, and must be taken to have waived his claim to double costs.

Cresswell, contra.—It is clear, that under this statute the defendant is entitled to double costs; and if so, a suggestion may be entered. The statute intends to say, that the Justice or Justices,—that is, the Court in the case of a discontinuance,—or a Judge,—that is, where the cause is tried and there is a verdict for the defendant, or the plaintiff is nonsuited,—shall allow the defendant his double costs. It does not require that the discontinuance shall be after a trial had. If the defendant is entitled to double costs, he is entitled to have a suggestion entered on the roll. [*Parke, B.*—It is not necessary. There is a difference between this case and cases under the Court of Conscience Acts; because, in the latter cases, there must be something on the record to justify their allowance. But in this case,

(a) 2 Stra. 974; S. C. 2 Barnard. 372, 432, 449.

in whatever way the costs are taxed, there will be no error in the judgment.] There can be no harm done to the plaintiff by entering the suggestion, and supplying that on the record which would enable the defendant to use it in evidence in any future proceeding, to shew that this action was brought against him in his character of justice of the peace.

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LORD ABINGER, C. B.—That is not a purpose for which a suggestion ought to be allowed to be entered. There is no example of a suggestion having been entered in such a case, and there could be no necessity for it, the plaintiff having offered to pay the double costs.

PARKE, B.—A suggestion has been often entered unnecessarily. The plaintiff was willing to pay the defendant the costs without this application, and he was therefore brought here unnecessarily. The rule must therefore be discharged with costs.

Rule discharged with costs, the plaintiff undertaking to pay the double costs.

DOE *d.* MORRIS *v.* ROE.

IN this case an ejectment had been brought by a landlord against a tenant, on a forfeiture incurred by the breach of covenants in the lease. It appeared that the lessor of the plaintiff had granted a lease to one *Davies*, who assigned it by way of mortgage to one *Jones*, an attorney. The lessor not having, as he alleged, any counterpart of the lease, applied to *Davies* for an inspection of the lease, and was referred by him to *Jones*, the mortgagee. The attorney

Where a lease is executed by both the lessor and lessee, and the lessee assigns it by way of mortgage, the lessor, having no counterpart, is entitled, on an ejectment brought for a forfeiture, to compel the mortgagee to

allow an inspection, and give a copy of the lease.

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of the lessor of the plaintiff then applied to *Jones* for that purpose, but he refused to allow the inspection. *J. Jervis* having obtained a rule to shew cause why *Jones* should not allow the plaintiff to take a copy of the lease, and why he should not pay the costs of the application;—

R. V. Richards shewed cause.—The lessor of the plaintiff has no right to call upon the mortgagee to disclose his title. The object for which this lease is required to be seen is for the purpose of enabling the lessor to defeat the security of the mortgagee, and therefore he ought not to be allowed to call upon the mortgagee to produce it.

J. Jervis, contra.—The mortgagee stands in the same situation as the mortgagor; and if the mortgagor was bound to give a copy and inspection, so is the mortgagee. The mortgagee takes the lease subject to the same rights as the lessee, and the lessor had a right to inspect the lease to see if the covenants were performed. [*Parke, B.*—Have you any authority to shew that the Court interferes with a third party?] No; but this person is not to be considered as a third party. In this case, as there appears to have been only one part of the lease, the lessee was a trustee of that instrument for the benefit of the lessor, if he required it; and the assignee must hold it subject to all the liabilities of the original tenant. [*Parke, B.*—Was the lease executed by both parties?] It appears to have been so, though it is not stated in the affidavits.

PARKE, B.—The matter must be referred to the Master, to ascertain whether this instrument was executed by both parties. If it was, it carried on the face of it notice of an implied trust on the part of the lessee, that he would produce it at the request of the lessor. If that was so, then the rule will be absolute; otherwise not.

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ASSUMPSIT by the drawer against the acceptor of a bill of exchange, payable to the drawer or his order three months after date. The declaration was in the form given by the rule of *Trinity* Term, 1 *Will.* 4, sched. No. 4, and stated that the plaintiff, on &c., made his bill of exchange in writing, and directed the same to the defendant, and required the defendant to pay to the plaintiff £—, three months after the date thereof, “which period has now elapsed,” and the defendant then and there accepted the said bill, &c. To this declaration there was a demurrer, assigning for cause, that it did not appear by the declaration that the bill was due at the time of the commencement of the action, the words “now elapsed” referring to the date of the declaration, and not to the commencement of the suit.

A declaration on a bill of exchange by the payee against the acceptor, which was according to the form given by the rules of *Trinity* Term, 1 *Will.* 4, stated it to be payable three months after date, “which period has now elapsed.” The declaration was demurred to, on the ground that it did not appear that the bill was due at the commencement of the suit. The Court refused to set aside the demurrer as frivolous.

Semble, That since the Uniformity of Process Act, the above form is incorrect.

E. V. Williams now moved to set aside this demurrer as frivolous, and for leave to sign judgment as for want of a plea, under the rule of *Hilary* Term, 4 *Will.* 4, s. 2. The demurrer is, that it does not appear that the bill became due before the commencement of the suit, but it is submitted that that does manifestly appear, as it is alleged that the period has “now elapsed.” The plaintiff has adopted the form given by the rule of Court *verbatim*, and therefore the defendant cannot be allowed to demur to it.

PARKE, B.—Those rules were made before the Uniformity of Process Act, 2 *Will.* 4, c. 39; and the forms given by them would then be correct in actions by bill, because then the declaration in those actions was the commencement of the suit; but that is no longer so. The suing out the writ is now the commencement of the suit, and those forms are therefore no longer correct. In the old forms

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of declarations on bills of exchange, if the date of the bill was stated with certainty, it was sufficient to shew that it was payable a certain time after the date; but if the day were laid under a *videlicet*, it was necessary to allege that the time for payment had elapsed before the commencement of the suit, or the exhibiting of the bill, and I know I used always so to aver. We cannot set aside this demurrer as frivolous. Had you not better amend your declaration?

The rest of the Court concurred.

Rule refused.

DOE *d.* Earl of FALMOUTH *v.* ALDERSON.

A consent-rule, in an ejectment for lands and mines, by which the party appeared to defend for "a certain tin-bound, (setting out its abuttals), containing a certain mine, &c.," was held insufficient, on the ground that ejectment will not lie for a tin-bound.

The defence should be for the mine which the defendant is working under the tin-bound.

MANNING had obtained a rule to set aside the interlocutory judgment which had been signed in this cause for want of a sufficient consent-rule. The ejectment was for lands and mines in *Cornwall*; the defendant appeared, and entered into a consent rule to defend for "a certain *tin-bound* in the parish of, &c., (setting out the abuttals), containing a certain mine, &c."

Butt shewed cause, and urged that a tin-bound was a mere easement, for which ejectment would not lie; being nothing more than the liberty of entering and marking out certain bounds, within which the party acquired a right to work a tin-mine. The plaintiff, therefore, who claimed as owner of the surface, as he could not allow the defendant to go to trial on such a consent-rule, (it had already been once amended), was obliged to sign judgment.

Manning, in support of the rule, contended that a tin-bound was not an easement, but that the boulder acquired a right to the soil. The mode of acquiring a title to a

tin-bound is described in the notes to *Rowe v. Brenton* (a), by which it appears that where a party has gone through the regular proceedings for obtaining possession of the bounds, "judgment is given, and a *writ of possession* issues to the bailiff of the stannaries, who delivers possession accordingly." The bailiff does not deliver possession of the mines, which are not yet opened, but of the land itself in respect of the mines; and for this qualified possession the bounder may defend by the local but well-known description of "tin-bounds," as in the case of a grant of *prima tonsura*, aftermath, herbage, or the pasture of one hundred sheep, for all which ejectment will lie, and in respect of which therefore an ejectment may be defended. The bound-owner may *demise* his bounds (b). In *Jenkins v. Davy* (c), 30 *Hen.* 8, the defendant justified, in trespass *qu. cl. freg.*, in right of his possession as a tin-bounder, and though the whole of the record is not transcribed, it must be inferred from the purpose for which it is extracted, namely, that of proving the custom, that the right was established. [*Parke, B.*—You have no possession of the *surface*.] The right of re-

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(a) 3 *Man. & Ryl.* 497, note (a).

(b) In the last convocation of *Tinnars*, (held 27 *Geo.* 2), articles 3 and 6 expressly recognize the practice of granting *sets* (*i. e.* leases) of tin-works by the bound-owners.

(c) In the book called the "*Bailiff of Blackmore*," temp. *Eliz.* *Harl. MSS.*, 6380, p. 7, where the custom is thus pleaded:—"Quod clausus prædictus necnon loci in quibus &c., sunt, et a tempore &c., fuerunt, sex acrae terræ cum pertinentibus in *Chivounder* prædicto, parcell. manerii, &c., de *Tywarnhaile*, de quo quidem manerio illustriss. *Edwardus* nunc

princeps *Wallia* est, et præd. tempore transgressionis prædictæ fuit, seisitus in dominico suo ut de feodo; quodque habetur, et a tempore &c. habebatur, talis consuetudo infra manerium præd., quod liceret omnibus personis ligis domini regis existentibus, cujuscunque gradus seu conditionis fuerint, ad piscand. (*semble*, to get tin in stream works), *bundand.* et faciend. tot et tanta opera stannar. in quolibet loco infra manerium præd. in quo stannum inveniri potuisset, reddendo et solvendo domino manerii quintodecimam partem stanni inde provenientis pro tolneto suo."

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entry in the land supposes *him* out of possession. [Lord *Abinger*, C. B.—Subject to a right to enter and sink, the possession of the *surface* remains in the lord. *Parke*, B.—Why cannot you defend for a mine lying within certain bounds called tin-bounds?] We may not be in actual possession of all the mines lying within the bounds.

LORD ABINGER, C. B.—If you are in possession of one mine within the bounds, which you are working, that is surely a sufficient possession of all the mines within the bounds. The consent-rule in its present form applies to nothing for which an ejectment will lie. However, the defendant may amend it again on payment of costs.

Rule absolute, on payment of costs.

THOMPSON v. CLUBLEY.

In an action by the indorsee against the acceptor of a bill of exchange, it is competent to the acceptor to shew that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by the plaintiff.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 200*l.*, drawn by one *H. R.*, payable to his own order, and by him indorsed to the plaintiff.

Plea.—That the bill of exchange was wholly made by *H. R.*, at the request and for and by way of accommodation of and for the plaintiff, and was accepted by the defendant, at the request of *H. R.*, for and by way of like accommodation of and for the plaintiff; and that at the time of making and accepting the said bill of exchange, it was expressly agreed by and between the said parties, that if the said bill of exchange should happen to be outstanding at the time when it became due, it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or *H. R.*, upon or in respect of it: concluding with a verification.

Replication.—That before and at the time of the com-

mencement of the suit, the plaintiff was, and still is, the holder of the said bill of exchange for good and sufficient consideration, in respect of his being the holder thereof; without this, that the said bill was either made or accepted by way of accommodation of or for the plaintiff, or that it was agreed by or between the parties, in manner and form as the defendant has above in the same plea in that behalf alleged; concluding to the country.

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The case came on for trial at the sittings after *Easter Term*, before Lord *Abinger*, C. B., when the defendant, in support of his plea, called *H. R.*, who stated that in the spring of 1833 he had occasion to raise money, and having applied to an attorney to assist him, it was arranged between him and the plaintiff that the witness should give him the bill on which the present action was brought, but which should be taken up by the plaintiff, and that witness should receive bills of like value from the plaintiff, for which witness was to provide; and that the defendant had not received any value for his acceptance. It was objected on the part of the plaintiff, that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to shew that the acceptor was not to pay it, but that the plaintiff, who was the indorsee, was to take it up, and not to sue the acceptor; the effect of which was to make an entirely different contract. *Foster v. Jolly* (a) was relied upon as in point, but the objection was overruled. It was then contended, that the exchange of bills between the plaintiff and *H. R.*, the drawer and indorser, was sufficient consideration to entitle the plaintiff to sue the acceptor of the present bill. The learned Judge, however, said that, in his opinion, this bill had really been taken by the plaintiff on a special contract by

(a) 1 C. M. & R. 709.

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him not to sue the defendant, and as that was proved by the evidence, the plea was made out. Whereupon the plaintiff's counsel elected to be nonsuited, the learned Judge giving him leave to move to enter a verdict for the amount of the bill, if the Court should be of opinion that the plaintiff was entitled to recover.

G. Henderson now moved accordingly, on the grounds taken at the trial.

Sed per Curiam.—This defence was clearly admissible, inasmuch as it shewed that the acceptance was in truth for the accommodation of the plaintiff, and that all the parties put their names to the bill without consideration. With regard to the evidence being inconsistent with the terms of the instrument, we are of opinion that the agreement as to payment was collateral, and not part of the original contract. It was a collateral agreement, that the plaintiff would not enforce the contract upon the bill.

Rule refused.

BOWERS v. EVANS and Another.

In support of a plea of payment, the defendant proved the payment of 11*l.* to *H.*, the plaintiff's attorney, on the plaintiff's account. In answer to this the plaintiff tendered *H.* as a witness, to prove that the defendant afterwards called upon him and got the money back again: but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict:—*Held*, that the witness was competent, and that the evidence ought to have been received.

ASSUMPSIT on a promissory note, to recover the sum of 12*l.* 15*s.*—*Plea*, as to the sum of 1*l.* 15*s.*, parcel &c., a tender; and as to the sum of 11*l.*, payment: and issue thereon. The cause was tried before the under-sheriff of *Carmarthenshire*, when the note having been proved, the defendants called a witness, who proved that one of the defendants had paid to *Howell*, the plaintiff's attorney, the sum of 11*l.* on account of the plaintiff. In answer to this,

called upon him and got the money back again: but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict:—*Held*, that the witness was competent, and that the evidence ought to have been received.

the plaintiff proposed to call *Howell* to prove that, subsequently to the payment of the money, which was made in the presence of a witness, the defendant came to him when alone, and got the money from him again: but the under-sheriff being of opinion that the witness was incompetent, rejected him, and the defendant obtained a verdict. In the early part of this term, *E. V. Williams* obtained a rule to shew cause why there should not be a new trial, on the ground that the evidence had been improperly rejected; against which

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Chilton now shewed cause.—The witness was incompetent, because, by receiving the money for the plaintiff, he becomes responsible to him for it; and he is not competent to prove that it was afterwards taken away from him by the defendant. It is laid down in 1 *Phill. on Evidence*, 62, and cases are cited in support of the position, that an agent of one of the parties to the suit is not a competent witness, if, in case of the verdict being against the party for whom he is called, he would be liable to him for the costs of the action. Here, if there should be a verdict for the defendant, *Howell* would be liable for the costs. Again, it is said, that “a person who has received money due from the defendant to the plaintiff, is not a competent witness for the defendant to prove that he received the money as agent for the plaintiff.” This case is just the converse of that, as he is here called to disprove payment—to suppress the fact of the payment. [*Parke, B.*—To found that argument, it is incumbent upon you to establish that *Howell* did suppress the fact of payment. You import that fact into the case.] It is submitted that that must be taken to be so, because he has brought the action, and denied the plea of payment.

PARKE, B.—You say that he would be liable to a special action on the case for suppressing the fact of pay-

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ment; but to support such an action, it must be proved that he did suppress that fact. It cannot be assumed. And I am inclined to think that the 26th section of the 3 & 4 *Will. 4*, even if there were the fact of suppression, has cured his incompetency on that ground. There is no doubt that he was a competent witness.

The rest of the Court concurred.

Rule absolute.

ELIZABETH PHYTHIAN v. THOMAS WHITE and RICHARD OWEN.

Trespass for breaking and entering three closes, describing them by abuttals. *Plea*, that the said closes in which &c., were the closes, soil, and freehold of one *T. L.*, and justifying as his servants.

Replication—That before the said times when &c., and before the said *T. L.* had any thing

in the said closes in which &c., one *R. T.* and his wife, in right of his said wife, one *A. L.*, and one *E. K.*, were seised in their demesne as of fee of and in two undivided third parts, &c., of and in the said closes in which &c., and one *A. R.* was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which &c. And the said *R. T.* and *M.* his wife, being so seised, afterwards, and before the said *T. L.* had any thing in the said closes in which &c., to wit, on &c., at &c., a certain fine was had and levied of, *inter alia*, the parts, shares, and interest of the said *R. T.* and *M.* his wife of and in the said closes in which &c., which fine was then had and levied, *inter alia*, to the use of *P. M. C.* and his heirs, during the life of the said *M. T.*; by virtue of which fine the said *P. M. C.* became seised in his demesne as of freehold, for the term of the life of the said *M.*, of and in the said parts, &c., of the said *R. T.* and *M.* his wife, of and in the said closes in which &c. And the said *P. M. C.*, *A. L.*, *E. K.*, and *A. R.*, being so seised, afterwards, and before the said *T. L.* had any thing in the said closes in which &c., and before the said times when &c., demised to the plaintiff, who thereupon entered and was possessed until the defendants wrongfully broke and entered therein, &c. *Rejoinder*, traversing the seisin of *R. T.* and *M.* his wife, *A. L.*, *E. K.*, and *A. R.*, in the said closes in which &c.; on which issue was joined. At the trial the plaintiff proved a case as to two of the closes, but offered no evidence as to the third:—*Held*, that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the third.

defendants pleaded, *first*, as to the breaking and entering &c., (enumerating the substantial part of the trespasses in both counts), that the said closes in the said first count mentioned respectively in which &c., now are and at the several times when &c. were the closes, soil, and freehold of one *Thomas Legh*, wherefore the defendants, as the servants of the said *Thomas Legh*, &c., (justifying in the usual manner, and alleging the posts, &c., in both counts, to have been wrongfully placed on the said closes, and to have been removed to a short and convenient distance, &c., doing no unnecessary damage to the plaintiff, &c.) *Secondly*, to the residue of the declaration—not guilty. *Thirdly*, to the same trespasses as the first plea was pleaded to, that the said several closes in which &c., before and at the said times when &c., were and are, and from time immemorial have respectively been, within and parcel of the manor of *Newton* and fee of *Mackerfield*, in the county of *Lancaster*, and have been during all that time, and until the wrongful inclosure thereof, part and parcel of a certain waste within the said manor called *Goose Green*; and that the said *Thomas Legh*, Esq., long before and at the said times when &c., was lord of the said manor of *Newton* and fee of *Mackerfield*, and in right of his said manor and fee was long before and at the said times when &c., seised in his demesne as of fee of and in the said closes in which &c., in right of his said manor and fee; and which said closes, shortly before the said times when &c., had been, and then were, wrongfully inclosed from the said waste; wherefore, &c. (justifying as before).

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The plaintiff joined issue on the second plea; as to the first, she replied, “that before the said times when &c., or any of them, and before the said *Thomas Legh* had any thing in the said closes in which &c., or any of them, one *Richard Taylor* and *Mary* his wife, in right of his said wife, one *Ann Lunt*, and one *Ellen Knowles*, were seised in their demesne as of fee of and in two undivided

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third parts, the whole into three equal third parts to be divided, of and in the said closes in which &c., by reason of the said *Mary Taylor*, *Ann Lunt*, and *Ellen Knowles*, then being the daughters and co-heirs of the Rev. *Thomas Knowles*, deceased; and one *Ann Renshaw* was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which &c.; and the said *Richard Taylor* and *Mary* his wife being so seised, afterwards, and before the said *Thomas Legh* had any thing in the said closes in which &c., or any of them, to wit, at or as of the general session of the assizes holden at &c., on &c., a certain fine was had and levied, &c., [setting forth a fine between *P. M. C.*, plaintiff, and the said *Richard Taylor* and *Mary* his wife, defendants, of, amongst other things, the said parts, shares, and interests of the said *Richard Taylor* and *Mary* his wife of and in the said closes, in which &c.,] which said fine was then had and levied (amongst other things) to the use of the said *P. M. C.* and his heirs, during the term of the natural life of the said *Mary Taylor*; by virtue of which said fine, and of the statute for transferring uses into possession, the said *P. M. C.* then became seised in his demesne as of freehold, for the term of the natural life of the said *Mary*, of and in the said parts, shares, and interests of the said *Richard Taylor* and *Mary* his wife, of and in the said closes in which &c. And the said *P. M. C.*, *Ann Lunt*, *Ellen Knowles*, and *Ann Renshaw*, being so seised as aforesaid, they afterwards, and before the said *Thomas Legh* had any thing in the said closes in which &c., or any of them, and before the said times when &c., or any of them, to wit, on &c., did each and every of them respectively demise his and her part, share, and interest, of and in the said closes in which &c. respectively to the plaintiff, to have and to hold the same respectively to the plaintiff from year to year, &c.; by virtue of which said demises she the said plaintiff afterwards, and before the said

several times when &c., or any of them, to wit, on &c., entered into the said closes in which &c., with the appurtenances, and became and was possessed thereof, until the defendants wrongfully broke and entered the same as in the said declaration and in the introductory part of the said first plea is alleged.—Verification.

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To the last plea the plaintiff replied, that the said *Thomas Legh*, Esq., was not, in right of the said supposed manor and fee, at the said several times when &c., or any of them, seised in his demesne as of fee of and in the said closes in which &c. in the said first count mentioned, as being part and parcel of any waste within and parcel of the said manor, in manner and form, &c. There was also a new assignment of excess.

The defendants rejoined to the replication to the first plea,—that, before the said *Thomas Legh* had any thing in the said closes in which &c., the said *Richard Taylor* and *Mary* his wife, in right of his said wife, the said *Ann Lunt*, and *Ellen Knowles*, were not, nor was any of them, seised in their demesne as of fee of and in two undivided third parts, the whole into three equal parts to be divided, of and in the said closes in which &c., by reason of the said *Mary Taylor*, *Ann Lunt*, and *Ellen Knowles*, being the daughters and coheirs of the Rev. *Thomas Knowles*, or in any other manner, nor was the said *Ann Renshaw* seised in her demesne as of fee of and in the other undivided third part of the said closes in which &c., in manner and form, &c. To the replication to the last plea, they added the *similiter*, and, relinquishing their second plea so far as the same related to the trespasses newly assigned, suffered judgment by default thereto.

At the trial before Lord *Abinger*, C. B., at the *Liverpool Summer Assizes*, 1835, the plaintiff proved her case as to two of the closes in which trespasses were alleged to have been committed, but gave no evidence as to the

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third ; and a verdict was taken for the plaintiff, with leave to the defendants to move to enter a verdict as to the third close. In *Michaelmas* Term last, *Cresswell* obtained a rule *nisi* for setting aside the verdict generally, or for entering a verdict for the defendants as to the third close.

Wightman, Cowling, and Ramshay, now shewed cause.—Admitting, as must be contended for by the defendants, that the issue raised by the traverse of the first replication is indivisible, its effect is this ; “ the closes in which &c.,” mean those closes in which trespasses were proved to have been committed ; and since trespasses were proved in the two closes only which have been found to belong to those under whom the plaintiff claims, that issue is found substantially for her. In *Bassett v. Mitchell* (a), to trespass *quare clausum fregit*, the defendants justified on the ground that the said close in which &c., was part of an allotment set out by commissioners under an Inclosure Act ; to which the plaintiff replied, that the said close in which &c. was not part of that allotment ; and it appeared that the close was not all of it within the allotment, but that the part in which the actual trespass was committed was ; and it was held that the justification was made out : and there *Littledale, J.*, observed, that “ the close in which &c., was applicable to any part of the land within the bounds stated in the declaration, in which the plaintiff might shew a trespass actually committed.” The same argument will hold here. The defendants may, on a future occasion, shew in what closes the trespasses in this action were actually committed, so that the record will not of necessity be evidence against them as to the third close ; and if it is, it will be a hardship brought on by themselves, for they should have pleaded the general issue, on which they would have had a verdict as to the third close, and it would then have been clear to what extent the record was ap-

(a) 2 B. & Adol. 99.

plicable. [Lord *Abinger*, C. B.—In the case cited, there was only one close, which was described by abuttals; here there are three so described.] The issue is, however, in strictness, divisible, and to be taken distributively. The replication should be looked at like a declaration, and the plaintiff is entitled to damages in proportion to the number of closes on which the defendants have trespassed. *Tapley v. Wainwright* (a) is an authority to shew that such an issue is divisible. The plaintiff will then be entitled to a verdict for the two closes, and the defendant for the third.

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Cresswell, Crompton, and Watson, contra.—The defendants were entitled to a verdict for the three closes, as the plaintiff has not chosen to leave the burthen on the defendants, but has, by the replication, taken upon herself the proof of title to the whole, which she has failed in substantiating [Parke, B.—Suppose the issue had been taken on the pleas, how would the verdict have been in that case?] It is admitted that if the issue had been so taken, and the plaintiff had proved a title in close A., it would have entitled her to a verdict as to that close. But upon this issue the plaintiff has tied herself up, so as to take the proof of title to the whole upon herself. If it had been a question of freehold only, this might have been a divisible allegation; but here there is a title set up to the whole in the replication. The late cases which have been referred to, only shew what is the meaning to be put upon the words “the closes in which &c.” In several of them the distinction is taken as to this very point. *Tapley v. Wainwright* is distinguishable on this ground, for it only shews what the words “the closes in which &c.” mean; but does not say, that if there are three closes described, you must not shew a title to some part of all the closes. In *Bassett v. Mitchell* (b), Lord *Tenterden* takes this dis-

(a) 5 B. & Adol. 395; 2 Nev. & M. 697, S. C.

(b) 2 B. & Adol. 103.

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inction : he says, “ In *Morewood v. Wood* (a), the Court said, the defendant would be obliged to prove the prescription *on both the places named*; but it does not follow that he must have proved it as to every part of each place.” He therefore seems to have thought, that in such a case a title must be proved in *some* part of *all* the places named ; that was so held in *Morewood v. Wood*, in the case of a prescription. Here a fine is pleaded, which is as strong as a prescription. The effect of the replication is to say that the whole of the premises passed by the fine. In *Richards v. Peake* (b), *Holroyd, J.*, says, “ If the allegation extends to the whole of *Burgey Cleve Garden*, then the plaintiff has alleged in pleading, and was bound to prove, that the whole of *Burgey Cleve Garden* had been enjoyed and held in severalty for thirty years.” [*Parke, B.*—(after referring to the pleadings) Surely this is a distributive allegation.] Suppose the defendants had traversed the fine, and the issue had been what passed by the fine, then the plaintiff must have shewn that the fine conveyed all the three closes. [*Parke, B.*—Suppose you were to raise such an issue, and say nothing passed by the fine, and that it was competent to the defendants to raise that question, I should say that it was still distributable.] If an allegation of a prescription, which is founded originally on a grant, in certain places, is indivisible, and must be proved as to all, it would seem to follow that the law is the same with regard to a fine, which is a solemn grant by record. An allegation as to freehold may be different.

Lord ABINGER, C. B.—If the declaration had been for trespasses in one close, whether described by one or more names or abuttals, it might have been a question in which part of that close the trespasses had actually been com-

(a) 4 T. R. 157.

(b) 2 B. & Cr. 925; 4 D. & R. 572, S. C.

mitted; but here there are trespasses laid to have been committed in three different closes, described specifically. The pleas, therefore, admit trespasses to have been committed in some parts of each of the three, but justify on the ground of each of the three being the freehold of another. The plaintiff's replication is the same in effect as if she had said that each of them was her freehold. I think that this is a divisible allegation, and that therefore the plaintiff must retain her verdict for the two, and that a verdict should be entered for the defendants as to the third.

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PARKE, B.—It is clear that the plea of soil and freehold is divisible; and this special replication is in the nature of such a plea, for it avers the freehold to have been in another; an issue raised thereon is therefore as divisible as one raised in the ordinary manner on the plea of soil and freehold. The allegations as to the fine, &c., are similarly to be taken distributively, as if repeated with respect to each of the closes. I am therefore of opinion that the plaintiff is entitled to a verdict as to two closes, and the defendants as to the other.

BOLLAND and GURNEY, Bs., concurred.

Rule accordingly.

BARTLETT v. WATKINS.

TRESPASS against the defendant, a constable of the parish of *Clifton*, in the county of *Gloucester*, for seizing and taking away a cart-wheel of the plaintiff. *Plea*, not guilty. At the trial before *Gurney*, B., at the last *Bristol* Assizes, the defendant gave in evidence a warrant

The 5 Geo. 4, c. lxxix., (the *Clifton* Watching and Lighting Act), does not extend to those parts of the parish of *Clifton* which, by the 16 Geo. 3, c. 33, and 43 Geo. 3, c. 140, were made part of the city of *Bristol*.

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of distress, signed by a magistrate of the county of *Gloucester*, for non-payment of a rate for lighting and watching the parish of *Clifton*, made under the 5 Geo. 4., c. lxxix., intituled “An Act for lighting and watching the Parish of *Clifton*, in the County of *Gloucester* ;” and the question was, whether the jurisdiction of the justices of the county of *Gloucester*, within the part of the parish of *Clifton* in which the plaintiff’s house was situate, was taken away by the 16 Geo. 3, c. 33 (a). The 17th section of that act, after reciting that the business which will be carried on at the floating dock, quay, &c., thereafter mentioned, in the parish of *Clifton*, will be chiefly transacted by and between persons engaged in the trade of the said port of *Bristol*, enacts, “That from and after the 29th day of *September*, 1776, all that part of the parish of *Clifton* [therein particularly described, and in which the plaintiff’s house was situate], shall be to all intents and purposes whatsoever, except as thereafter mentioned, *wholly exempted and separated* from the county of *Gloucester*, and from all *jurisdiction*, power, and authority of all sheriffs, escheators, coroners, *justices*, &c., of the county of *Gloucester*, for ever, and may and shall be taken and accepted as *member* of the city of *Bristol* and county of the same city, and within the jurisdiction, power, and authority of the mayor, sheriffs, coroners, escheators, justices, &c., of the said city and county of the same, for ever, as fully and amply as if the same had been part and parcel of the said county and city before and at the time of granting the several charters under which the mayor, burgesses, and commonalty of the city of *Bristol*, do now

(a) Intituled “An Act to remove the danger of fire among the ships in the port of *Bristol*, by preventing the landing certain commodities on the present quay; and for providing a convenient quay, and proper places for land-

ing and storing the same; and for regulating the said quay, and the lighters, boats, and other vessels carrying goods for hire within the said port of *Bristol*; and for other purposes therein mentioned.”

hold and exercise criminal and civil jurisdiction within the same city, &c. ; or as if the several powers and authorities thereby given were herein repeated and applied to the said district hereby united to and made a part of the said city, &c."

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Sect. 18. " Provided always, that nothing herein contained shall extend or be construed to extend to the making any alteration within the district so exempted and separated from the county of *Gloucester*, and added to the city of *Bristol*, touching any tax, rate, levy, or assessment whatsoever, now or hereafter to be raised in the said parish of *Clifton*, or to the charging the said district with any tax, &c., usually raised within the said city of *Bristol*, or touching any matter relative to any ecclesiastical, parochial, or manorial jurisdiction or right whatsoever, &c."

And by the 65th and 66th sections of the 43 Geo. 3, c. 140, (" for improving and rendering more commodious the port and harbour of *Bristol*"), the *Hot-well Road*, in the parish of *Clifton*, was also made a part of the city of *Bristol*, in the same terms, and subject to the same exceptions, as in the former act.

The learned Judge, being of opinion that the proviso in the 16 Geo. 3, c. 33, s. 18, operated to preserve the jurisdiction of the county justices in the present case, and that the defendant was protected by the warrant, directed a nonsuit, giving the plaintiff leave to move to enter a verdict for 1s.

The 5 Geo. 4, c. lxxix., enacts, by s. 1, that the churchwardens and surveyors of the highways of the said parish of *Clifton*, for the time being, together with certain persons named therein, shall be and they are thereby appointed commissioners for lighting and watching the parish of *Clifton*, in the county of *Gloucester*, and for carrying that act into execution.

Sect. 2 gives the right of appointment of new commissioners to the inhabitants and occupiers of lands, &c.,

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within the said parish, assessed to and paying the lighting and watching rate authorized by the act, and assembled in manner therein prescribed.

By sect. 6, commissioners are to be inhabitants and occupiers of lands, &c., within the parish of *Clifton*, of the annual value therein mentioned, and to take an oath to that effect.

Sect. 17 relates to the appointment of officers by the commissioners, and the security to be given by them, &c.; and enacts, that if any such officer shall refuse or neglect to deliver up his accounts to the commissioners after such notice as therein mentioned, on complaint of such neglect or refusal to any justice of the peace for the *county, city, town corporate, or place wherein such officer shall reside or be*, such justice is empowered to bring the party before him by warrant, and hear and determine the matter in a summary way, &c.

By ss. 23 & 24, any justice of the peace *for the county of Gloucester* is empowered to apprehend by warrant, and commit to the county gaol or house of correction, or to inflict a fine upon, persons wilfully or negligently breaking lamps, &c. Ss. 27 & 28 contain other provisions for the recovery of penalties before a justice or justices of the county of *Gloucester*. And by ss. 33 & 34, constables, watchmen, &c., appointed under the act, are to be sworn in before a justice for the said county, and may be committed by such justice, for neglect or misconduct, to the county gaol or house of correction.

Sect. 39 empowers the commissioners to raise money for carrying into effect the powers of the act, by a rate or rates to be made, assessed, charged, and levied, under the name and description of "the *Clifton* lighting and watching rate," on all houses situate within the said parish of *Clifton*, in manner therein mentioned; and in case of refusal to pay any of the said rates when due, after demand,

the same are to be levied and recovered by distress and sale of the goods and chattels of the party in default, by warrant under the hand and seal, or hands and seals, of any one or more justice or justices of the peace acting for the said county of *Gloucester*, such defaulter having been first summoned as therein mentioned; and, in default of such distress, such justice or justices are empowered to commit the defaulter to the county gaol or house of correction, for a period not exceeding six months, or until payment.

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Sect. 44 provides, that in case any person rated shall quit his house, &c., wherein any rate shall be made, before having paid such rate, and shall afterwards refuse to pay the same when demanded, it shall be lawful for one or more justices of the said county to grant a warrant of distress against such defaulter, authorizing any constable of any parish, &c., within the said county, to distrain and sell the goods of such person, such warrant being countersigned or backed *by some justice or magistrate for the county, city, or liberty*, where the said person shall then reside or such goods shall be found; with the same power of commitment, in default of distress, as is given by s. 39.

Sect. 53 provides for the recovery of all other penalties and forfeitures incurred under the act before the justices of the county.

Sect. 57 gives an appeal to parties aggrieved by any rate or assessment, or order or judgment of the commissioners, or order or determination of any justice or justices, in pursuance of the act, to the general or quarter sessions of the peace to be holden *for the county or place where the cause of appeal shall arise*. And s. 58 provides, that in any appeal from the said rates or assessments, the justices at the general or quarter sessions *for the said county of Gloucester* may amend without quashing the same, &c.

Bompas, Serjt., in *Michaelmas* Term last, obtained

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a rule *nisi* to enter a verdict, pursuant to the leave reserved (a). In the present term,

Erle and *Crowder* shewed cause, and relied on the excepting proviso of the 16 *Geo. 3*, c. 33 ; contending that the question in this cause was clearly one touching a rate or assessment to be raised in the parish of *Clifton*, and relative to a parochial jurisdiction and right. The act made the district in question a part of the city of *Bristol* for the purposes of mercantile business, the merchants for whose accommodation the new quays were constructed being mostly inhabitants of *Bristol*; but not for any parochial purposes whatever. If this were not so, that district would be out of the jurisdiction of the constables and watchmen of *Clifton*, and would in fact become extra-parochial, by which the greatest possible inconvenience and danger to the public peace would necessarily ensue. The argument on the other side must go to this extent, that nobody could be compelled to pay rates in that district, nor could any body enforce the penalties for non-payment.

Bompas, Serjt., and *Ball*, in support of the rule, contended, that the exceptions in the 16 *Geo. 3* operated only to prevent any alteration in the nature and extent of the rates or taxes imposed upon the district thereby made part of the city of *Bristol*, but not to limit the previous absolute transfer of *jurisdiction* from the county justices to those of the city; and that, on a review of all the provisions of the 5 *Geo. 4*, it clearly appeared that it applied

(a) A question was also made, whether the plaintiff's house abutted on any part of the streets, &c., lighted and watched under the act; s. 41 exempting from rateability persons whose premises were not

so abutting; but it does not seem to be material to report the arguments on this point, which resolved itself entirely into a question of fact.

only to that part of the parish of *Clifton* which still remained for all purposes a part of the county of *Gloucester*, and not to the district mentioned in the former acts; and they referred to the several sections of the statute above stated, in confirmation of this view of it (a).

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Cur adv. vult.

On a subsequent day, the judgment of the Court was delivered by—

PARKE, B.—The only question which was reserved for our consideration in this case was, whether a justice of the peace for the county of *Gloucester* had jurisdiction to levy upon the plaintiff a rate imposed upon him by the commissioners for lighting and watching the parish of *Clifton*, under the powers of the 5 *Geo.* 4, c. lxxix., in respect of buildings occupied by him in that part of the parish which is in the county of the city of *Bristol*, and abutting upon streets or ways lighted and watched under that act. This was the main point in the cause; the others were disposed of during the argument. This question depends entirely upon the construction of that act: at the time it passed, by far the greater part of the parish of *Clifton* was in the county of *Gloucester*, two small portions having been separated from the rest, and annexed, by virtue of two acts of Parliament, the 16 *Geo.* 3, c. 33, ss. 17 & 18, and 43 *Geo.* 3, c. 140, ss. 65, 66, to the county of the city of *Bristol*, except (amongst other things) touching any tax, rate, levy, or assessment, then or thereafter to be raised in the parish of *Clifton*, or touching any ecclesiastical, parochial, or manorial jurisdiction or right. These exceptions had the effect of continuing the separate portions in the county of *Gloucester* for the purposes of levying

(a) The question being merely of local importance, it has not been thought necessary to report the arguments at length.

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the King's taxes, county rates, poor-rate, and church-rate; but they could not have any effect in preventing Parliament from dealing as it might think fit, by subsequent acts, with the whole parish, and establishing a new rate for a special purpose in the part only which is in the county of *Gloucester*; they can only assist us in the construction of such subsequent acts, if ambiguous words are used.

What, then, was the meaning of the legislature, to be collected from the whole purview of the 5 *Geo.* 4? Unfortunately, it has not expressed itself distinctly on this subject. Ambiguous words have been used in the title and preamble, which may apply either to the whole parish of *Clifton*, part of which is in the county of *Gloucester*, or to *that part* of the parish which is in that county; and which of the two was intended is to be collected from the context, and from a due consideration of the inconveniences which would attend each construction. The arguments to be derived from the other clauses of the statute appear to us to be unfavourable to the former interpretation of the act; for the jurisdiction for offences committed in the district lighted and watched is given by several sections (23, 24, 27, 28, 32, 33, 34, 39, 51, 53, 58) to justices of the county of *Gloucester* alone; and it is not to be supposed that the legislature intended to give them jurisdiction out of their proper county. The form of oath in the 6th section is the only circumstance in the context which indicates an intention to include the *whole* parish within the act; and if we refer to the inconveniences which might occur from conflicting jurisdictions, if the *Gloucestershire* magistrates are to have a special concurrent authority in the part of the parish in *Bristol* with those of that city,—many of which inconveniences were forcibly stated on the argument—and consider that the only evil of the opposite construction is, that the commissioners cannot light and watch the part in question, or

that added to *Bristol* by the second act, if they should think proper to do so; we think we are most likely to construe the act correctly by holding that the provisions of the statute apply only to the *Gloucestershire* part of the parish.

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The exceptions in the former acts, the 16 *Geo.* 3, and 43 *Geo.* 3, afford us no ground for coming to a different conclusion; for although by them the separate part is continued to be annexed to *Gloucestershire*, for the collection of the King's taxes and parochial rates, the powers of this act, and the rates thereby raised, are not of the same nature, but are imposed only on particular portions of the parish which the commissioners may choose to light and watch, and which are benefited thereby.

We therefore think that the plaintiff is entitled to recover, and the rule must be made absolute.

Rule absolute.

EDWARDS v. CHAPMAN.

INDEBITATUS *assumpsit*, in the sum of 200*l.*, for the price and value of goods sold and delivered.

Plea, as to the price and value of 850 pairs of trimmings, parcel of the said goods in the said declaration mentioned, to wit, the sum of 180*l.* 12*s.*, parcel &c., that the said goods, parcel &c., were sold and delivered by the plaintiff to the defendant, in pursuance of a certain contract before then made between the plaintiff and the defendant; and that afterwards, and before the commencement of the suit, to wit, on &c., it was agreed between the plaintiff and the defendant that the said contract should be wholly rescinded and annulled, and the same was then wholly rescinded and annulled accordingly.—Verification.

Assumpsit for goods sold and delivered. *Plea*, that the goods were sold and delivered upon a certain contract, and that afterwards it was agreed between the plaintiff and defendant that the contract should be wholly rescinded and annulled:—*Held*, that the plea was bad.

General demurrer, and joinder in demurrer.

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The following was the point stated for argument on the part of the plaintiff:—The plaintiff means to contend, that no written contract being mentioned in the declaration, the rescinding of it is no defence.

Cowling, in support of the demurrer.—It is admitted by the plea that the goods were sold and delivered to the defendant, and have been kept by him, and therefore it is quite immaterial whether the contract has been rescinded or not.

R. V. Richards, contra.—The cause of action arises from the contract for the sale of the goods, and not from the delivery of them; and if the parties agree to rescind and annul the contract, which the plaintiff by demurring admits to have been the case, no action can be maintained.

PARKE, B.—A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction.

Judgment for the plaintiff.

BRILL v. CRICK.

On an action coming on to be tried at the assizes, an agreement in writing was entered into, that the trial should be postponed till the next assizes, on the defen-

ASSUMPSIT.—The declaration stated that, before the making of the promise and undertaking, and the promissory note of the defendant, as thereafter mentioned, an action had been brought in the Court of *Exchequer*, wherein the now plaintiff was plaintiff, and *John Robinson* was defendant; and issue having been joined between

dant in that action, and the now defendant, undertaking to give the plaintiff a promissory note payable on demand, by way of security, in case the plaintiff should recover a verdict against the then defendant, to be given up if the plaintiff, the payee, should fail in that action. The note was accordingly given, but after it was signed, a memorandum was indorsed upon it, stating that the note was given upon the condition mentioned in the agreement:—*Held*, this indorsement was to be considered as merely a marking of the note for the purpose of identification, and not as an incorporating of the agreement, so as to render the note an agreement or a conditional promise.

the parties thereto, such proceedings were therein had, that, at the assizes held at *Chelmsford*, in and for the said county of *Essex*, on &c., before &c., it was ordered by the Court, by and with the consent of the parties, their counsel and attorneys, that the trial of that cause should be postponed until the then next assizes, and that the said *John Robinson* should pay the costs of the day, (to be taxed), and give security to the satisfaction of *R. B.*, on or before *Thursday*, the 12th day of *March* then instant, for the damages and costs, if any, to be recovered in that action. And thereupon, theretofore, to wit, on the 12th of *March*, 1835, by an agreement then made and entered into between *George Shaw*, the attorney for the plaintiff, and the now defendant, the attorney for the said *J. Robinson*, the said *George Shaw* and the now defendant did thereby agree and declare that the said cause &c., &c., should be, with the consent of the plaintiff, postponed, and the order of *Nisi Prius* thereto annexed made accordingly, upon the following conditions, that is to say: that the now defendant, as the said *J. Robinson's* attorney, and the said *J. Robinson*, should, in pursuance of such order and condition, and in consideration of such postponement as aforesaid, sign a promissory note, payable to the plaintiff, for the sum of 500*l.*, the amount of damages laid in the declaration in the said cause; and it was thereby agreed, that the said note should remain in the custody of the said *G. Shaw* until the trial of the said cause, the said *G. Shaw* undertaking not to permit the said note to be negotiated in the interval; and the said *G. Shaw* undertook, that if a verdict and judgment should be obtained by the said *J. Robinson*, or the plaintiff should ultimately be nonsuited, the said *G. Shaw* should deliver up to the now defendant the said promissory note, without requiring payment of the sum secured, or any part thereof. And it was further agreed, that in case the plaintiff should obtain a verdict and

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judgment, the said promissory note should be immediately enforced for the full amount of damages found or given for the plaintiff, with costs to be taxed by the proper officer. And the plaintiff avers, that, in pursuance of the said agreement, and for the consideration aforesaid, the defendant and the said *J. Robinson* did afterwards, to wit, on &c., sign and deliver to the said plaintiff a promissory note, dated the day and year last aforesaid, and whereby they jointly and severally promised to pay to the plaintiff, or order, 500*l.* on demand. And by a memorandum then indorsed on the back of the said note, it was declared by the defendant and the said *J. Robinson*, that the said note was given upon the conditions mentioned in the said agreement, and in pursuance of the said order of *Nisi Prius*. The declaration then averred the recovery of a verdict and judgment in the Court of *Exchequer*, for the sum of 436*l.* 12*s.* 6*d.*, and costs, whereof the defendant had notice; and then alleged as a breach, that the defendant had not hitherto, nor had the said *J. Robinson*, paid the said sum of money in the said note specified, nor had either of them paid the damages, costs, and charges aforesaid, &c.

The first plea, after setting out the agreement stated in the declaration *in hæc verba*, alleged, that the agreement was so made by the defendant as the attorney for the said *J. R.* as therein mentioned, and with the said *G. Shaw* in manner as is therein mentioned, and that the written instrument therein called a promissory note, was and is in the words and figures following, *viz.* :—

“ £500.

“ 12th March, 1835.

“ We jointly and severally promise to pay to Miss *El. H. Brill*, or order, the sum of 500*l.* on demand.

“ *John Robinson.*

“ *John Crick.*”

And that the memorandum indorsed thereon, as is in that behalf in the said declaration alleged, was and is in

the words following, that is to say:—"This note is given upon the conditions mentioned in the memorandum of agreement hereto annexed, (meaning the said memorandum of agreement hereinbefore particularly mentioned), and in pursuance of the order of *Nisi Prius* hereto annexed, (meaning the order of *Nisi Prius* in the said declaration first mentioned). The plea then averred, that the instrument in the declaration mentioned, and therein called a promissory note, was stamped as a promissory note, and not as an agreement; without this, that the said defendant promised in manner and form as in the declaration is alleged:—concluding to the country. Second plea, that the defendant did not make the said promissory note *modo et formâ*. There was also another plea, which became immaterial after the verdict. The replication took issue on the pleas.

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At the trial before *Alderson*, B., at the *London* *Sittings* in this term, the plaintiff produced the promissory note with the agreement annexed to it, the note bearing upon it the indorsement stated in the plea, which was proved to have been written upon the note immediately after it was signed; but the indorsement was not signed by the parties to the note. Two objections were taken at the trial—*First*, that the instrument amounted to an agreement, and could not be read without an agreement stamp; *secondly*, that it was not valid as a promissory note, being payable upon a contingency. The learned Judge, however, overruled the objections, and the plaintiff recovered a verdict for the sum of 436*l.* 12*s.* 6*d.*

The sizer now moved to enter a verdict for the defendant on the two first issues, or in arrest of judgment, on a defect in the declaration.—This instrument is not valid as a promissory note, inasmuch as it is made payable upon the contingency mentioned in the agreement referred to, which must be taken to be incorporated in it. If any thing, it

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operated as an agreement, and ought to have been stamped as such. *Leeds v. Lancashire* (a), and *Hartley v. Wilkinson* (b), are authorities to shew, that indorsements on the back of promissory notes, stating them to be given upon certain conditions, render them invalid, and that such instruments are agreements, and must be stamped and declared on as such. He also referred to *Stone v. Metcalfe* (c). It is true, that in each of those cases the indorsement was written on the note before the note was signed, but that can make no difference. In this case it was proved that the indorsement was made at the time, immediately after the signing of the note, and was part of the same transaction. It is admitted, that if it had been delivered as an absolute promissory note, it was not competent to the parties afterwards to limit its negotiability by any indorsement upon it. But, where a note is made, it being understood at the time to be payable upon a contingency, though the indorsement is written after it is signed, it is invalid as a promissory note. In this case the agreement was, that the recovery upon the note should be dependent upon the recovery of the judgment. *Secondly*, if this was a promissory note, the plaintiff ought to have declared upon it as such; instead of which he has set out the agreement and the memorandum indorsed on the note, and has not declared on it as a promissory note.

LORD ABINGER, C. B.—This is not a note depending upon a contingency, as the agreement is collateral to the note.

PARKE, B.—It is very clear that this indorsement never was intended to alter the legal effect of the note. It was made for the purpose of ear-marking the note only, and to shew that it was the note referred to in the agreement. As to the second point, it is to be observed, that

(a) 2 Camp. 205.

(b) 4 Camp. 127.

(c) 4 Camp. 217.

the plaintiff in his declaration does call it a *note*. And it is so called in the memorandum. The plaintiff has anticipated a defence, and has answered it. The averment of the indorsement brings it within the principle acted upon in *Stone v. Metcalfe*, as he has averred that the note was signed and delivered, and *then* the memorandum was indorsed upon the back of the note.

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ALDERSON, B.—By the memorandum on the note, which begins “this *note*,” the defendant admits it to be a note.

Rule refused.

IN THE EXCHEQUER CHAMBER.

ATTORNEY-GENERAL *v.* NASH and Others.

(*In Error from the Court of Exchequer.*)

THIS was an information against the defendants, as executors of the will of *John Wilkinson*, deceased, for legacy duties alleged to be payable in respect of the residuary bequest of his personal estate. The information being filed for the purpose of reviewing the decision in the case *In re Wilkinson (a)*, a special verdict was taken, setting forth the will, and judgment was entered by consent for the defendants in the Court of *Exchequer*, and a writ of error brought into this Court. The points marked for argument by the *Attorney-General* were—

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest “among poor pious persons, in ten or fifteen pounds, as they should see fit.”

1. That the entire sum bequeathed to the charitable objects is the legacy, and not the smaller parts into which it is to be divided for the purposes of distribution.

(a) 1 C. M. & R. 142.

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2. That either the executors are the legatees, and that the persons receiving the bounty do not take as legatees under the will, but by the gift of the executors; or—

3. That the legacy is to be construed as a legacy to poor pious persons, as a class.

On the part of the defendants—

That the legacy duty attaches upon beneficial interests only.

That no party taking beneficially under this bequest has an interest to the amount of 20*l.*; and that consequently no legacy duty is payable in respect thereof.

Amos, for the Crown.—The whole question turns on the construction to be put upon the residuary clause of the will (*a*). That depends on the language of the 55 *Geo. 3*, c. 184, schedule, part 3, directing that “for every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of *August*, 1815; also for the clear residue, (when devolving to one person), and for every share of the clear residue, (when devolving to two or

(*a*) The clause in question was as follows:—“Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in bankers’ hands, bills of exchange, &c., &c., be collected into cash, and laid out in the funds, in the Bank of England, and that my executors hereafter

named, and their heirs and assigns, do receive the interest thereof at the bank, half-yearly, and divide it among *poor pious persons*, male or female, old or infirm, in 10*l.* or 15*l.*, as they see fit, not omitting large and sick families, if of good character.” One of the executors was the testator’s son.

more persons), of the personal or moveable estate of any person who shall have died after the 5th day of *April*, 1805, (after deducting debts, &c., first payable thereout), where such residue, or share of residue, shall be of the amount or value of 20% or upwards, and where the same shall be paid, &c., after the 31st day of *August*, 1815"—certain sums *per cent.* shall be paid; being, in the case where the bequest is in favour of a party beyond a specified degree of collateral consanguinity, or a stranger in blood, 10 *per cent.* on the amount of the sum bequeathed. The duty is imposed on legacies generally, and it will not be presumed that charitable legacies are a *casus omissus* in the statute. Here, the legacy is in favour of persons whom the testator did not at all contemplate in the light of persons in propinquity of blood to himself, and the duty of 10 *per cent.* attaches on the whole sum. The word *retainer* in the statute seems to apply to a case of this description, where, though the money is not paid to the class of persons to be benefited, it is retained for the class. It is a retainer of the whole sum from the commencement of the trust. The 36 *Geo. 3*, c. 52, s. 6, under which this duty is collected, expressly provides that the duties shall be accounted for by the executor or administrator, *upon retainer* of the legacy or residue; and s. 27 provides, that the executor or administrator shall, on payment or other satisfaction of the legacy, take a stamped receipt for it, in the form there prescribed. Those provisions obviate any supposed difficulty as to the poor persons in question paying the duty or giving the receipt. The duty is to be assessed with reference to the persons who are to be benefited. [*Bosanquet, J.*—They may be strangers in blood or not.] It is sufficient that the testator does not contemplate them as relatives. In the *Attorney-General v. Burnie* (a), which was a bequest of a residue in favour of the testator's son

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(a) 3 Y. & J. 531.

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and his wife, the duty was held assessable, half in regard to the wife's relationship and half in regard of the husband's, because the testator contemplated the wife as taking an interest as well as the husband. The legislature looks to the intention of the testator as expressed on the face of his will, not to the ultimate result. The 36th Geo. 3, c. 52, s. 11, was referred to in the Court below, as conclusive in favour of the defendants, and as having been framed to meet this particular case. It is much more probable that it was framed to meet a case altogether different (a). The 39 Geo. 3, c. 73, which was passed to exempt from the payment of legacy duty *certain specific legacies* given to bodies corporate and other public bodies and societies, shews that by the former acts *pecuniary* legacies given to such bodies were not exempted; and in such case, some of the recipients might be relatives of the testator, and known to be so. So, the 56 Geo. 3, c. 56, the *Irish* Stamp Act, expressly exempts from duty legacies given "to be applied in support of any public charitable institution in *Ireland*, or for any purpose merely charitable." That affords an argument that in the *English* act the Legislature intended that a legacy, though for a purpose merely charitable, should be chargeable with duty. *Ex parte Franklin* (b) is a direct decision that the duty is payable in such a case as this. The Vice-Chancellor there puts the question upon its true ground, that this is a gift for a general charitable purpose, which was to embrace strangers in blood, and did not contemplate any individual recipients. It was said on the argument below, that the parish might be considered in that case as a body taking beneficially, as they would be benefited by the relief of their poor; but that was not the ground of the decision. It was, that where the object is a general charitable gift, the whole fund is chargeable in the hands

(a) See Gwynne on the Legacy Duties, p. 91.

(b) 3 Y. & J. 544.

of the executors. The universal practice as to the payment of duty on legacies to charitable institutions ought to have considerable weight: the usage may be a key to the intention of the legislature. In truth, the case of a bequest to a hospital is not substantially distinguishable from this, and the admitted practice as to them is not to be considered in the view taken of it by the Court below—that, as the entire control and power over the legacy is vested in the corporation or society, or its governing authority, the corporation or society may be considered as taking the beneficial interest: for if the trustees are the beneficial legatees, then, if they were relatives, a less duty would be payable. But if they do take the beneficial interest, so do the trustees here: the objects of the charity take only by the appropriation and selection of the trustees; and they have the same limited control, the same discretion and patronage, as the trustees of a hospital. But it is submitted, that neither in the one case nor the other are the trustees to be considered the beneficial legatees, but that the *class* to be benefited are so; and the whole sum being retained for their benefit, the duty is payable on that whole sum. A contrary decision must be productive of much inconvenience. Even if the persons actually receiving the charity are the beneficial legatees, suppose 10*l.* paid to an individual one year, and 10*l.* the next; the duty would then become payable. It would be extremely inconvenient and difficult to ascertain when and how, and to what amount, it had been paid. [*Littledale, J.*—Not so, because the executor is bound to retain the duty, and render an account. *Park, J.*—He is not bound to pay to the same person twice.] Then it would be in his power to decide whether any duty at all should be payable, which would be quite anomalous: in all other cases it is ascertainable on the face of the will, or by the happening of some event contemplated in the will. But here the individuals can never be ascertained—there is no vested right;

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then we are to look to the *class*, and to the general object of the testator.

Stephen, Serjt., for the defendants.—It is quite clear that, to constitute a legatee under the 55 *Geo.* 3, the party must take *beneficially*. It is essential also that he shall stand in a given and ascertained degree of propinquity to the deceased. Who, then, are the persons here who take beneficially, and who stand in such ascertained degree of propinquity? Certainly only the persons who are actually selected by the executors. It is not now pretended that the executors are the beneficial takers; otherwise one moiety would be taxed 10 *per cent.*, the other 1 *per cent.* only. But is it a legacy to a *class*? How can these “poor pious persons” form a class? The will contemplates all the poor pious persons in *England*. Further, it is to go to such as the executors shall select. And, if they form a class, what is to be the rate of duty?—for that also must be decided. The first person selected may be a descendant of the testator; then his legacy could only be charged at 1 *per cent.* Again, though each individual is to receive less than 20*l.*, it follows that, by taxing them as a class, all or many of them may be taxed, although not liable by law. On the other hand, taking 10 *per cent.* from the fund may tax nobody beneficially interested, because the executors may still give the same amounts of 10*l.* or 15*l.* to fewer persons: but several “poor pious persons” will lose the benefit altogether; while to those who become in fact the objects of the bounty, it will make no difference. Then, not the *legatees*, but the *fund*, is charged by these means; but there is nothing whatever in the act authorizing a tax on the fund. This is not a tax on property, but on succession, and on the successors, varying according to their propinquity to the deceased. The case of corporations is altogether different; they have a local habitation and a name, and take *quà*

corporation, or as a society : no ulterior person is there to be benefited, no individuals are contemplated, but only the body, which must be a stranger in blood. The act does not, as it is alleged on the other side, impose the duty on all legacies generally, but only on legacies bequeathed to the relations therein mentioned, and to strangers. But the defendants are not driven to say that this is a *casus omissus*, for it is plainly provided for by the 36 Geo. 3, c. 52, s. 11. The whole provisions of that clause are directly applicable to the case. As to the argument *ab inconvenienti*, the heavy penalties to which the executors are liable afford a sufficient security against fraud in the distribution of the charity. With regard to the argument drawn from the express exemption in the *Irish* act, legacies given to bodies corporate and public institutions having been expressly charged, it was necessary to follow that with an exemption of charitable institutions, which would otherwise have been taxed by the charging words ; and although duty has always been paid on bequests to charitable institutions in *England*, there is no case in which the duty on such a bequest has been enforced in a Court of law.

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Amos, in reply.—If the persons who receive the money from the executors are not the persons to pay the duty, it is unnecessary to inquire into the effect of the 36 Geo. 3, c. 52, s. 11, which relates only to the *manner* in which they are to pay, and applies only in case it is assumed that they *are* the persons to pay—which is assuming the whole question. It was therefore unnecessary, in *Ex parte Franklin*, as in the present case, to refer to it. The exemption in the 56 Geo. 3, c. 56, applies not only to the charitable purposes comprised within the previous charging words, but to all ; and shews therefore, that, but for the exemption, they would have been comprehended in the same general words as occur in the 55 Geo. 3, c. 184.

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Lord DENMAN, C. J.—We are all of opinion that this judgment must be affirmed. It was a judgment pronounced after very great deliberation, on a statute on which, undoubtedly, some difficulty might arise; but it appears to me that the Court were quite right in taking the view they did of the 11th section of the 36 Geo. 3, and I am at a loss to see how they could have taken any other. My Brother *Parke* says, that he does not know whether this case was reconcilable with the case of *Ex parte Franklin*, which had been decided by the learned Vice-Chancellor; but when we find that that section was not brought under the notice of the Vice-Chancellor for his decision, and after the deliberate argument that took place there, I think we may very well doubt what the view would have been which the Vice-Chancellor would have taken, if that section had been brought before him. It is possible that even then he might have carried his principle so far as to cover this particular case; but it is also possible he might have taken the view which the Court of *Exchequer* took, and which we take, that the very words of that section are such as to describe this case. There are certain cases in which uncertainties arise as to the mode in which the bequest will be beneficial to any body; and where that is the case, the parties beneficially interested are to pay the duty according to the manner which is therein described; it seems to me that this case falls entirely within its words and meaning, and therefore that no duty can be exacted of these defendants.

Judgment affirmed.

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WILLIAMS v. GARDINER.

THIS was a writ of error brought upon the judgment of the Court of *Exchequer*, in the case of *Gardiner v. Williams* (a), and was argued by

In libel, one of the counts set forth the following passage of a letter from the defendant to one P.—“ I have reason to suppose that many of the *flowers* of which I have been robbed, are growing upon your premises,” (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants, roots, and flowers* of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.’s garden). The previous part of the letter stated, that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant’s service in the same capacity, and had been discharged for dishonesty:—*Held*, on error, that the innuendo was not too large, and that the count was good.

Maule, for the plaintiff in error (the defendant below).—*First*, the inducement is not sufficiently connected with the letter which is the subject of the libel. The declaration alleges that the letter was published “ of and concerning the plaintiff below, in his said business and employment as a gardener.” Now, the declaration only states the plaintiff to have been gardener to Mrs. *Nicholls* and Mr. *Pierce*; but the letter refers to the plaintiff’s conduct as the gardener of Mr. *Williams*, the defendant below. There ought, therefore, to have been an inducement stating him to have been gardener to Mr. *Williams*. Where words were alleged to have been spoken of a plaintiff as treasurer and collector of tolls, it was held necessary to shew that he was both treasurer *and* collector: *Sellers v. Till* (b).

But, at all events, the innuendo that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to *Pierce*, and unlawfully placed them in his garden, is too large. The words of the libel itself are thereby enlarged, and a sense is given to them beyond their natural sense. Whenever words are used *ultra* their natural meaning, there must be some inducement to shew to the Court that they may bear that enlarged sense, and then it may be legitimately argued before the jury that they did bear it in the particular case. Here, the words of the libel are merely—“ I have reason to suppose that many of the flowers I have been

(a) 2 C. M. & R. 78.

(b) 7 D. & R. 121; 4 B. & C. 655.

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robbed of are growing on your (*Pierce's*) premises." There is nothing by way of independent averment, to shew that those words might have had the meaning imputed to them by the innuendo; no allegation that the defendant below had in fact been robbed at all, much less robbed by the plaintiff, of any plants, or roots, or flowers. *Goldstein v. Foss* (a) is an authority to shew that some such averment was necessary. So, in *Barham's case* (b), where the words were "Master *Barham* did burn my corn," innuendo, a barn full of corn, the judgment was arrested, because the innuendo enlarged the sense of the words, without any inducement to support such enlarged sense. So also, where the words were—"he hath forged this warrant," innuendo, the warrant of a certain sheriff on a writ of *capias* set out: *Thomas v. Axworth* (c). In *Miles v. Jacob* (d) the words were—"thou hast poisoned *Smith*," innuendo *quendam Samuelem Smith ad tunc defunct.*; and the declaration was adjudged bad for want of an independent averment that *Smith* was dead.

Again, the single word *flowers* in the libel is extended in the innuendo into "plants, roots, and flowers." It was said in the Court below, that flowers comprised roots and plants; but the jury must be taken to have given damages on the ground of the whole imputation, of stealing plants, roots, *and* flowers. The innuendo includes flowers, as well as plants and roots; by the latter, therefore, the plaintiff must be taken to mean something beyond flowers. [Lord *Denman*, C. J.—It is larger than the word *flowers* necessarily means, but not larger than the meaning of which it is susceptible. *Patteson*, J.—They are stated in the libel itself to be now growing.] The libel itself cannot be called in aid to supply the want of an allegation in the declaration. If a plaintiff were called in a libel an attorney, that would not supply the want of an allegation

(a) 1 M. & P. 402; 4 Bing. 489.

(b) 4 Co. Rep. 20.

(c) Hob. 2.

(d) Ibid. 6.

that he was one, though it might supply the *evidence* of his being so. Here there is nothing whatever in the libel itself naturally bearing the meaning that the plaintiff had been guilty of larceny—had stolen plants, roots, and flowers, from the defendant, or had unlawfully disposed of them to *Pierce*, or unlawfully placed them in *Pierce's* garden.

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Thesiger, contra.—As to the first point, the libel itself states that the plaintiff was the gardener of the defendant. [Lord *Denman*, C. J.—We have no doubt as to that point.] Then as to the innuendo. If it be rejected altogether, the letter itself is libellous. It contains most serious imputations on the plaintiff's character, and directly charges him with dishonest practices in his former service. *Roberts v. Camden* (a) and *Harvey v. French* (b) are authorities to shew that an innuendo which introduces new matter, without any antecedent colloquium to which it can refer to support it, *may* be rejected as surplusage. An innuendo is necessary only either where the words are uncertain in themselves, or where it is necessary to shew that they impute an indictable offence. The cases in *Hobart* are examples of the former, and *Barham's* case of the latter, branch of the rule. Thus, in *Miles v. Jacob*, the words of themselves had no definite meaning, and required explanation; but the innuendo alone could not give it them without introducing matter shewing the occasion on which they were uttered. *Day v. Robinson* (c) is distinguishable. There the words spoken were—"You have robbed me of one shilling, *tan-money*;" and the innuendo explained the meaning to be, that the plaintiff had fraudulently taken and applied to his own use a shilling received by him for the defendant, the produce of some tan sold

(a) 9 East, 93.

(b) 1 C. & M. 11.

(c) 1 Ad. & Ell. 554; 4 Nev. & M. 884.

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by the plaintiff for the defendant, as his servant: and it was held that the innuendo was bad without an introductory averment, as introducing new facts; but there the words were not actionable in themselves. This is a case of written slander, and it is submitted that the words are clearly actionable.

But even if the innuendo cannot be rejected, it is sufficient. Wherever any state of circumstances can be supposed that will support the innuendo, (which has now been found by the jury to be true), that is sufficient to sustain the count. Here the defendant below alleges that the flowers are growing on *Pierce's* premises; if so, they must have roots, and must be flowering plants; and so all the words of the innuendo may be proved by the facts imputed in the libel. The word *flowers* is commonly used by the standard *English* writers to signify a growing plant.

Maule, in reply.—Whatever a *flower per se* may mean, when associated with *roots* and *plants*, it means the flowering part of the plant, and they must mean something more.

In *Roberts v. Camden*, the innuendo did not at all qualify the imputation contained in the libel; here, it is aggravatory of the libel, and it cannot be rejected. The jury would be asked, "Do you consider the words to have been used in the sense imputed to them?" On issue joined on the plea of not guilty, the issue is, whether the words were used in the whole sense imputed to them in the innuendo; the jury cannot look to the introductory averments; that is for the Court. In *Harvey v. French*, there was not, properly speaking, any *innuendo*, but rather a statement of the defendant's intention in uttering the words. [*Patteson*, J.—That is what strikes me here; this is not an innuendo of the word *flowers*, but an explanation of the meaning of the whole sentence to which it is applied.] Still it is an explanation of the meaning of the

words, not of the intention of the writer. *Day v. Robinson* is in favour of the defendant below; for the judgment in that case assumes that an innuendo cannot be rejected, though the words are actionable without it, unless also it cannot enlarge the natural meaning of the words. It appears from all the authorities, that the want of proper introductory averments is not cured by verdict. Words are to be construed in their ordinary sense; and the words, “plants, roots, and flowers,” would undoubtedly be ordinarily understood as meaning something beyond *flowers*.

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LORD DENMAN, C. J.—We are of opinion that this judgment must be affirmed; not, however, on the ground that the word *flowers*, standing alone, can have a new meaning given to it by the innuendo; else the case would very much resemble that of “the barn full of corn;” but, on the ground that the innuendo is referable to the whole passage which it follows, and not to the word *flowers* only. But that whole passage clearly and naturally bears the meaning ascribed to it by the innuendo; its evident meaning is, that flowers capable of being planted,—i. e. plants, roots, and flowers,—had been stolen by the plaintiff from the defendant, and planted in *Pierce’s* garden. In deciding the case on this ground, we are not only not introducing any innovation, but abiding strictly by the rule laid down in former cases, as it was stated by Mr. *Maule*.

Judgment affirmed.

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TOLDERVY *v.* COLT and Others.

A testator devised certain real estates to trustees and their heirs, upon trust that his daughter *M.* should, until she should attain the age of twenty-one, if sole and unmarried, receive out of the rents and profits an annuity of 60*l.*, and that she should thereafter and until she attained thirty-one, if sole and unmarried, receive an annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should be paid only an annuity of 50*l.*, for her sole use, and that the estates should immediately upon the marriage be in trust for the children of his daughter *M.*, as tenants in common in tail; and for default of such issue, in trust for his the testa-

tor's sister *S.* and her heirs for ever: provided always, that in case his said daughter *M.* should marry with the consent of the trustees, it should be lawful for them to settle the estates upon *M.* and her husband for their joint lives and the life of the survivor, with remainder to the issue of the body of his said daughter, in such shares and proportions as the trustees should appoint, and in default of such appointment in such shares and proportions as were thereinbefore limited. *M.* married with the consent of the trustees (upon which occasion a settlement was made pursuant to the will) and died without issue:—*Held*, that the remainder to *S.* was conditional, depending on *M.*'s marriage *without* consent; and that *M.* having married *with* consent, the remainder to *S.* failed, although *M.* died without issue.

JAMES BOWMAN CLARKE, on the 10th of *July*, 1776, by his will devised as follows, viz.:—I give, devise, and bequeath unto my friends, *William Toldervy* and *Thomas Davis*, their heirs and assigns, all my freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of *Hereford* and elsewhere, to have and to hold the said messuages, lands, tenements, and hereditaments, with their and every of their appurtenances, unto the said *William Toldervy* and *Thomas Davis*, their heirs and assigns, to the use of them the said *William Toldervy* and *Thomas Davis*, their heirs and assigns, upon the trusts, and under and subject to the powers, provisoes, and limitations hereinafter expressed and declared of and concerning the same, (that is to say), in the first place, to the intent and purpose that my daughter *Mallett* shall from time to time, until she shall have attained the age of twenty-one years, if sole and unmarried, have, receive, and take annually out of the rents and profits of the said premises one annuity or yearly sum of 60*l.*, to be paid to her by the said *William Toldervy* and *Thomas Davis*, their heirs and assigns, by four even and equal portions, at or upon four days in every year, &c. And to the further intent that my said daughter *Mallett* may from time to time thereafter and until she shall have attained the age of thirty-one years, if she shall so long remain sole and unmarried, have, receive, and take out of the rents, issues, and profits of the said premises

one further or other annuity or sum of 40*l.* of like money, to be paid and payable to her by the said *William Toldervy* and *Thomas Davis*, or the survivor of them, or the heirs or assigns of such survivor, such further and other annuity, to be paid and payable in the proportions and on the days and times as the said annuity of 60*l.* is appointed to be paid, the first payment thereof to begin and be made on such of the said days or times as shall first happen next after she shall have attained the said age of twenty-one years; but it is my will, and I do hereby declare, that in case my said daughter *Mallett* shall either die before she shall have attained the age of thirty-one years, or afterwards marry without the consent of the said *William Toldervy*, if living, and, after his decease, without the consent in writing of the said *William Davis*, first had and obtained under the hands and seals of them respectively, then she shall be paid, for and during the term of her natural life only, one annuity or yearly sum of 50*l.*, and not the other annuities or either of them, which shall be paid in the proportions and at or upon the days and times as the annuities above mentioned are appointed to be paid; the first payment thereof to begin and be made at or upon such of the said days as shall first happen next after marrying without such consent as aforesaid; which said last-mentioned annuity shall be paid unto my said daughter for her own sole and separate use, exclusive of and without being subject or liable to the control, debts, or engagements of such husband as she may marry without such consent as aforesaid; and I do hereby will, order, and direct, that the receipt and receipts of my said daughter shall be good and sufficient discharge and discharges to the person and persons paying the same, for such sum and sums of money as shall be paid to her by virtue of this my will; and from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise, that all the said freehold messuages, tene-

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ments, lands, and hereditaments, with their and every of their appurtenances, shall be in trust for all and every of the child and children of the body of the said *Mallett* lawfully to be begotten, in such shares and proportions, manner and form as they the said *William Toldervy* and *Thomas Davis*, and the survivor of them, or the heirs of such survivor, shall from time to time direct and appoint, with or without power of revocation; and for want of such direction and appointment, in trust for such child and children, equally to be divided between or amongst them, (if more than one), share and share alike, to take as tenants in common and not as joint tenants, and the several and respective heirs of the bodies of all and every such child and children lawfully issuing; and in case one or more of such children shall happen to die without issue of his, her, or their body or bodies lawfully issuing, then, as to the share or shares of him, her, or them so dying without issue, in trust for the survivors or survivor, and others or other of them, to be equally divided between or amongst them, (if more than one), share and share alike, to take as tenants in common and not as joint tenants, and for the several and respective heirs of the bodies of such survivors or survivor, and others or other of them; and if all such children but one shall happen to die without issue of their bodies, or if there shall be but one such child, then in trust for such surviving or only child, and the heirs of his or her body or bodies lawfully issuing; and for default of such issue, then in trust, as to one moiety or half part of the said freehold messuages, lands, tenements, hereditaments, and premises, for my sister, *Lady Frances Burrard*, and her assigns, for and during the term of her natural life; and from and immediately after her decease, in trust and for the use of my sister *Sarah*, the wife of the said *William Toldervy*, and her heirs and assigns for ever; and as to the other moiety of the said messuages, lands, tenements, and hereditaments, with the appurtenances, in

trust and for the use of the said *Sarah Toldervy*, her heirs and assigns for ever. The testator then devised certain leasehold messuages and lands to his trustees, upon the same trusts and under the same limitations as were thereinbefore limited and declared concerning his freehold estate, or as near thereto as might be, and the nature of the several leasehold estates would admit of, to the end that the same might be held and enjoyed and go along with the freehold estates so long as might be, and the laws of *England* would permit. There then followed this proviso:—Provided always, and it is my will, that in case my said daughter shall in the lifetime of the said *William Toldervy* marry with his approbation and consent, or, after his decease, with the good liking, approbation, and consent of the said *Thomas Davis*, or the legal representative of the survivor of them, then and in such case it shall and may be lawful for them, or the survivor of them, or the legal representative of the survivor of them, to convey the said freehold messuages, lands, tenements, and hereditaments, and to assign the said leasehold messuages, lands, tenements, and premises unto such person and persons, use and uses, as they, or the survivor of them, or the legal representative of the survivor of them, shall think proper; so that the same is conveyed and assigned upon trust only, and for the use of my said daughter *Mallett* and such husband as she shall marry with such consent as aforesaid, for and during their joint lives, and the life of the survivor of them, (but not without impeachment of waste), with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions as they, my said trustees, or the survivor of them, shall think proper to direct and appoint; and for want of such direction, limitation, or appointment, in such shares and proportions as are hereinbefore limited respecting the same: provided further, and it is my will, and I do hereby authorize and empower my said trustees, and the survivor

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of them, and the legal representative of such survivor, and more especially the said *William Toldervy*, not only during the minority of my said daughter, but also from time to time, and at all times until my said daughter shall attain the said age of thirty-one years, in case she shall so long remain and continue sole and unmarried, (but not otherwise), to allow her, my said daughter, out of the rents, issues, and profits of the said messuages, lands, tenements, hereditaments, and premises, as well freehold as leasehold, and the monies to arise from the sale of the residuum of my personal estate, such further annual sum and sums of money over and above the said respective annuities or sums of 60%. and 40%. payable as above mentioned, as to him or them shall seem proper, or otherwise to pay and lay out the same for her board, education, maintenance, or support, and in such manner as they or the survivor of them, or the legal personal representative of the survivor of them, shall think fit; so that the same do not exceed the amount of the annual rents and profits of the said hereditaments and premises, and the interest of the said money, after payment of all taxes, repairs, and other payments and outgoings issuing and payable out of the same: provided furthermore, that in case my said daughter should marry without such consent as aforesaid, and shall have issue of her body lawfully to be begotten, then and in such case I do hereby will, order, and direct, authorize, and empower my said trustees, the said *William Toldervy* and *Thomas Davis*, and the survivor of them, and the legal representative of the survivor of them, to lay out and expend all or such part or parts of the rents, issues, and profits of the said freehold and leasehold messuages, lands, tenements, hereditaments, and premises, and the said monies and interest as shall remain and be received after payment of the above-mentioned annuity of 50%. (above in that case devised to my said daughter), in the maintenance and education, or in putting out appren-

tice, or otherwise providing for the issue of the body of the said *Mallett*, my daughter, lawfully to be begotten, during the life of the said *Mallett*, and until they shall respectively be entitled unto their respective shares of the said freehold and leasehold messuages, lands, tenements, hereditaments, and premises under and by virtue of this my will.

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The testator then recited that he was entitled to the reversion in fee of certain messuages and lands in *White-chapel*, which he thereby gave and devised to his sisters, Lady *Frances Burrard* and *Sarah Toldervy*, and the heirs and assigns of the said *Sarah Toldervy*.

The testator died on the 26th of *December*, 1776, without revoking his will, which was duly proved by the said *William Toldervy* and *Thomas Davis*, who took upon themselves the trusts and execution thereof. The said *Mallett Clarke* was the only child and heiress-at-law of the testator, and the said Lady *F. Burrard* and *Sarah Toldervy* were the only sisters of the testator, and they all survived the testator; but Lady *F. Burrard* died shortly after him, in the lifetime of the said *Sarah Toldervy*. In the year 1779 the said *Mallett Clarke* attained her age of twenty-one years, and in *December*, 1782, with the consent of the said *Wm. Toldervy*, married the Rev. *James Colt*; and by a settlement, dated the 30th of *November*, 1782, the trustees conveyed the property devised by the will to certain uses until the marriage, and after the marriage to the use of Mr. and Mrs. *Colt*, for their joint lives and the life of the survivor, but not without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to all and every the child and children of Mr. and Mrs. *Colt*, as tenants in common in tail, with benefit of survivorship; and if there should be but one such child, or all but one should die without issue, to the use of that child in tail. Mr. and Mrs. *Colt* died without ever having had any issue. *Wm.*

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Toldervy died in the year 1790, leaving the said *Sarah Toldervy* and also the said *Thomas Davis* him surviving. *Sarah Toldervy* devised all her real and leasehold estates to *James Bayley Toldervy* in fee. *James Bayley Toldervy* died, having made a settlement of the property comprised in the will in favour of his wife and children.

Sir John Colt, the nephew of *Mr. Colt*, having, upon his uncle's death, taken possession of the property, this bill was filed by the widow of *James Bayley Toldervy* against the heir-at-law of the surviving trustee under the will, and against the children of *James Bayley Toldervy*, praying for a delivery of the property and title deeds to the plaintiff; an account of the rents and profits received by the defendant (*Sir John Colt*) since the death of his uncle; and for the appointment of a receiver.

A motion having been subsequently made for the production of the deeds and documents in the cause, Lord *Abinger*, C. B., in *February*, 1835, after consulting *Parke*, B., upon the case, decided in favour of the plaintiff's title (a).

A motion being now made for the appointment of a receiver of the rents and profits, and the application being founded on title alone, on the matter coming on to be heard, Lord *Abinger*, C. B., considering the will on which the plaintiff's claim depended to be one of difficult construction, directed the case to heard before the full Court.

Temple and *Willcock* for the plaintiff.—In this case the plaintiff contends, that, upon the death of *Mr. and Mrs. Colt* (who was the testator's daughter) without issue, the estate devised to the sisters by the will took effect, and that the plaintiff, the devisee of *Sarah Toldervy*, the testator's sister, became entitled to the estate. The defendant contends, that *Mrs. Colt*, the daughter and

(a) See 2 Y. & C. 240.

heiress-at-law of the testator, was entitled absolutely to the estate, she having married with the consent of the trustee, and that the limitation in fee to the sister is only founded upon the condition that the daughter married without consent. It is clear, from the terms of this will, that it was the testator's intention to give to his daughter a very limited interest only, and to give to his sister the ultimate reversion in fee. The testator gives to the trustees the whole of his estate—not merely a naked legal estate—but he gives them very important powers—he gives them the power of consenting or not to his daughter's marriage, and of making a division of the property amongst his daughter's children. It is to be observed, however, that the power as to the consent to the marriage during the life of *William Toldervy* is not given to the two trustees, but to the husband of the testator's sister, *Sarah Toldervy*. He never contemplates that his daughter is to have any power of intermeddling with the estate. He gives her no part of the estate, nor even any part of the rents and profits, but merely an annuity out of the rents and profits; and her children were to take as tenants in common in tail only in the event of the trustees not exercising the power of distribution. The testator then goes on, "in default of such issue," to devise the same to his sisters, as to one of them absolutely in fee. If the will had rested here, it would have been clear that the sisters were to take the ultimate remainder in fee on his daughter dying without issue. In a subsequent part of the will, the testator, notwithstanding his having before contemplated and provided for a marriage with consent, goes on to recite that he is entitled to the remainder in fee of certain hereditaments in *Whitechapel*, and devises the same to his sisters in fee—marking, therefore, that although his attention had been drawn to the event of a marriage with consent, he still considered his sisters as the ultimate takers of his property. No one can read this latter part of the will

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without seeing that it is connected with the former part, and with the provision in case of a marriage with consent. That provision as to the marriage with consent is not introduced as a substantive devise, but only as varying the interest of his daughter in the estate, leaving her, under any circumstances, no greater estate than an estate impeachable of waste. After the provision referring to a marriage with consent, the testator gives to the trustees a power to increase the daughter's allowance, in case she continued single until she attained the age of thirty-one, and he then makes provision for the maintenance of the children in the event of a marriage without consent; thus mixing the whole into one general devise, the intention of which was to give to the daughter a limited interest for her life, and to make provision for her issue if she should have any; but if she died without issue, then to give to his sisters the ultimate reversion in fee. [Lord *Abinger*, C. B.—The testator has not provided for the event of his daughter's not marrying at all. *Alderson*, B.—Suppose she attained thirty-one, and did not marry, what interest would she take?] He gave her nothing, and intended to give her nothing, but a limited interest; but there is, it is submitted, sufficient in the will to enable the trustees to make provision for her in the event of her attaining thirty-one and not marrying. It is clear that he meant to give his whole estate away, and the ultimate limitation is to the sister, whom the plaintiff represents. But it will perhaps be said, that by this construction the heir-at-law would be disinherited, and that the heir-at-law is not to be excluded unless the intention be manifest. [Lord *Abinger*, C. B.—The notion that we are to consider the heir-at-law as a particular favourite has long been exploded. The heir-at-law is not to be ousted but by the plain expressed intention of the testator, or by necessary implication. *Alderson*, B.—All that can be said is, that, *prima facie*, the heir-at-law has a clear title; and in order to take away a clear title, you must

shew another.] If the devise is not complete, the heir is entitled to what is not disposed of, both in equity and at law; but where the testator has made a complete legal devise of the whole, the heir-at-law is disinherited; and no regard is to be paid in a court of equity to any thing but the bare construction of the will. That principle was laid down in *Falkland v. Bertie* (a). Now, in this case, it is clear that the testator intended to devise his whole estate away, and the devise to the trustees (which is all which the law can follow) is in this instance complete. The fair construction of the will is then to be considered, without regard either to the heir-at-law or the devisee. The general intention of the testator must prevail even against express words which are inconsistent with that intention. *Synge v. Hales* (b), *Thellusson v. Woodford* (c). In *Sherratt v. Bentley* (d), the late Master of the Rolls, Sir J. Leach, says, "If the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by mistake or ignorance on the part of the testator as to the force of the words used," and he carried that principle so far as to reject the words "heirs, executors, administrators, and assigns" for the purpose of giving effect to the general intention of the testator. The same principle was acted upon in *Crone v. Odell* (e). If, therefore, the proviso as to the daughter's marriage with consent be repugnant to the rest of the will, it must yield to the general intention of the testator to be collected upon the whole will. In *Crone v. Odell* it is also said, that in construing a will the Court will look to the state of the testator's family, not to control an obvious intention, but as circumstances from which the Court may be better able

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(a) 2 Vern. 340.

(b) 2 Ball. & B. 507, 511.

(c) 4 Ves. 227.

(d) 2 Mylne & K. 157.

(e) 1 Ball & Beatty, 470, 480,
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to judge as to what his intention was. In this case the testator had a daughter and two sisters, one of whom was married and had children. His intention might therefore have been to provide for his daughter and her husband, in case she married with consent, and to provide for the issue of his daughter, whether she married with or without consent; and having so provided for his daughter, he gives the whole estate to his sisters, subject to those limitations which he had previously chalked out. The testator, (without looking out of the will,) manifestly contemplated some danger of his daughter making an imprudent marriage, and wished to provide against it, and he does it by placing her under the protection of her natural protector (her uncle), and requires his assent to the marriage, as the terms on which the estates which he has before chalked out were to devolve to her; but in the event of her not marrying with that consent, he proposes then to cut her down to 50*l.* a-year, with a direction to the trustees to accumulate the residue for the general purposes of his will. The testator has by the first clause made an ample provision of all he intends for the daughter in case she marries without consent. In the second clause he contemplates a distinct thing altogether. In the first he is looking to the obedience or disobedience of his daughter. There is a provision in either case. In the second he is looking not at his daughter,—he has ceased to regard obedience or disobedience; he says, I intend now to provide for her children. Having done that in two modes by the aid of the proviso, he then says “whom else have I to consider? I have stated in my will that I have two sisters.” And then the statement comes, “in default of such issue, then in trust, &c.” Now it would do very little violation to this will, and would only be explaining the clear intention of the testator, to insert these words—“and for default of such issue, *then I direct that the said trustees shall stand seised of my estates* in trust.” But it is not necessary to

introduce such a clause, as it is implied; although, for the purpose of a more ample reading, it would be proper to introduce it. [*Parke, B.*—The grammatical construction is at present against you, because the directions to the trustees to stand seised are all of them in that clause of the will which provides for the event of the daughter marrying without consent. Then comes the question whether it may not be altered, which you say would make the grammatical construction in your favour.] The language just preceding is, “the heir of his or her body or bodies lawfully issuing, and for want of such issue;”—then there is no connecting word;—it is “in trust.” [*Parke, B.*—The clause would run thus:—And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will and direct that all the said freehold messuages, lands, tenements, and hereditaments, with their and every of their appurtenances, shall be in trust for all and every the child and children—then there goes on the description of the estate of the children,—and for default of such issue, then in trust as to one moiety, that the estates shall be in trust for my sister Lady *Frances Burrard*, and so forth. Now according to the strict grammatical construction of these words, it would appear that the condition overrides all; still it may be limited and controlled by the context. *Alderson, B.*—You want to make a fresh limitation altogether. I think you ought not to be allowed to change the expression, to make it a separate sentence.] It is not proposed with a view of changing the meaning of the sentence, but as a mode of conveying what it is contended must be assumed to be the intention of the testator. The testator having provided for his daughter, he then contemplates the failure of issue, and he has a new set of persons to bring under his consideration, on whom he would naturally fix, namely, his two sisters; and it is merely suggested that it would be a natural mode of putting it, that when he contemplates these persons, he would begin

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a new clause ; then, having only two sisters to provide for, he begins—" In trust as to one moiety or half part of the said freehold messuages, lands, tenements, hereditaments, and premises, for my sister Lady *Frances Burrard*," and so forth. Now, assuming that that clause was continuous, and that the testator did not take up his pen again to write a new sentence, although it was natural for him to do so, and taking the grammatical construction to connect that sentence in the strongest way that it can be contended for on the other side, and that the testator had left out altogether the limitation to the children—supposing the testator to have gone directly to dispose of his estate to his sisters, how would the clause have read—" and from and immediately after the marriage of my said daughter, without such consent as aforesaid, I will and devise that all the said tenements, &c., shall be in trust as to one moiety or half part for my sister Lady *Frances Burrard*," and so forth ; what effect has it ? It merely remits it back to the same position in which the issue stood ; they are immediately to take in the event of the daughter's death, having married without consent, and, by the introduction of the proviso, to be postponed in the event of the marriage with consent, the testator having inserted the word " immediately," for the purpose of taking care that it should not come in conflict with the proviso which he afterwards intended to introduce ; so that the marrying without consent affects only the time at which the estates are to come into possession, and does not at all affect the limitations. Then it becomes a limitation which is to take effect either way, according to the determination of that state of circumstances ; and if the state of circumstances contemplated do not occur, then *instantly*. [Lord Abinger, C. B.—Does not the question arise, whether the words " in default of such issue " mean " in default of the issue of the marriage without consent ;" or whether they do not mean " in default of the issue of the daughter generally ? "] With

respect to the question whether the words "such issue" amount to a condition or a conditional limitation, the recent case of *M'Kinnon v. Sewell* (a) is an authority to shew that it is a conditional limitation, and not a condition. In that case there was a bequest of a residue to *D.* for life, with remainder to her daughter *L.* if she should survive her mother and attain twenty-one; but if not, then to such other children of *D.* as should be living at their mother's decease and should attain twenty-one; and if all such other children should die under twenty-one, then over to *M.*—*D.* survived her daughter *L.*, and her only other child attained twenty-one, but died in her lifetime. It was there held, that, on the death of *D.* leaving no children, the bequest over to *M.* took effect: and that the remainder to "such other children" was a conditional limitation, and not a condition, and that in the event the remainder over was good. [*Alderson*, B.—The word "such," according to the argument, as I collect it, is not a description of the particular sort of issue at all; inasmuch as, whether the daughter married with consent or without consent, the issue are to take, but that they take immediately in the one case, and after the estates to be interposed by the proviso in the other: therefore, inasmuch as the limitation over is general on the failure of such issue, it means on the failure of the issue of the body, whether they take mediately or immediately.] The sisters stand exactly in the same position, in the testator's mind, whether the daughter marries prudently or imprudently: only as he proposes a reward to the daughter for her prudent marriage, and as an inducement to her to marry properly, he proposes to give that in the event of her marrying with the consent of the trustees, which is ordinarily expected in a marriage settlement, namely, an estate to her and her husband for their joint lives, and the life of the survivor.

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Stinton appeared for the representative of the surviving trustee, and

Johnes for the children of *James Bayley Toldervy*.

Knight, Preston, and Cooper, for the defendant, Sir *John Colt*.—Upon the sound construction of this will, *Mrs. Toldervy* was entitled to the estate in question only in the event of the testator's daughter marrying without consent. It was a condition precedent depending upon her marriage without consent; and, as that event has not happened, that remainder never vested. It has been properly said, that, in considering this will, the Court ought to place themselves in the situation of the testator, and consider the state of his family. He was a widower with one child, a daughter: he provides in his will in the most anxious manner for his daughter's welfare, and she is the principal object of his care and attention. It is plain that he intended to provide for his own posterity in preference to any other class of persons, and that in no event should any other person take his property until his own posterity were exhausted. It is the will of a man who knew that his only child, the object of his care and affection, was his heir-at-law and his sole next of kin, and that what he did not dispose of, the object of his principal care and solicitude must by law obtain. There are certain general rules of construction of all wills, and which will be material in construing the present. The first is, that no Court is at liberty to depart from the grammatical and proper construction of the language used in the instrument, unless required by an evident necessity resulting from the apparent intention of the testator to be collected upon the whole will. [*Parke, B.*—It appears to me, that the best language in which that rule is expressed is in the words of Mr. Justice *Burton*, in *Warburton v. Loveland* (a),

(a) 1 Hudson & Brooke, 648.

where he applies it to the construction of statutes.] Another rule of universal application is, that, in construing a will of any obscurity, you must not merely contemplate the events which have happened, but those which might by reasonable possibility have happened. [Lord *Abinger*, C. B.—That the testator might reasonably have contemplated.] Another rule is, that the heir-at-law has a *prima facie* title, and is not to be disinherited without express words, or unless a clear intention is shewn to devise the estate to another. A fourth rule is, that, although in general it is to be presumed that a testator sitting down to make his will does not intend to die intestate, the observation loses its force where the individual who would take in case of his intestacy is noticed in the will as an object of his care and attention. Fifthly, that you must bear in mind what the governing motive or predominant feeling of the testator was, to be collected from the will, and you must give effect, if possible, to all the words of the will, but you must not strain obscure words to bear on a subject foreign to such general intention.

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First.—Let us consider this will as if no power to enable the trustees to make a settlement on his daughter's marriage with consent had been inserted in it; and, *secondly*, as if such a power had been inserted. On the first supposition the construction of the will is obvious. The testator gives his whole estates to the trustees upon the trusts after-mentioned. It is quite clear that an equitable limitation, or a limitation of an equitable estate, whether created by will or not, is subject to the same rules of construction as a limitation of a legal estate. But there is a distinction between trusts executory and trusts executed. In the former the Court considers the intention of the testator, and acts according to it; in the latter a Court of equity follows the law. *Jervoise v. The Duke of Northumberland* (a). In that case Lord *Eldon* says:

(a) 1 Jac. & Walk. 570.

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“ I repeat, where there is a trust executory ; because one is a good deal confused by the inaccuracy of the expressions trust executory and executed. The latter, no doubt, in one sense of the word, is a trust executory—that is, if *A. B.* is a trustee for *C. D.*, or for *C. D.* and others, that, in this sense, is executory, that *C. D.*, or *C. D.* and the other persons, may call upon *A. B.* to make a conveyance and execute the trust ; but these are cases where the testator has clearly decided what the trust is to be ; and, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same, whether the estate is equitable or legal.” This is not a trust executory. If anything, it is a trust executed ; and, as a consequence, the will must be read precisely in the same manner by a Court of equity as it would be read by a Court of law, if all the dispositions in the will were of the legal estate. It is thus laid down in *Sanders on Uses* (a) :—“ It is a maxim generally received, that in the construction of trusts the Courts of equity adopt the rules of law applicable to legal estates.” That proposition is supported by what was said by Lord *Hardwicke* in *Garth v. Baldwin* (b) :—“ In limitations of a trust either of real or personal estate, the construction ought to be made according to the construction of limitations of a legal estate—with this distinction, unless the intention of the testator plainly appears to the contrary.” It is quite clear, therefore, that in this part of the will there being no conveyance directed, and nothing to be done by the trustees, they had not the legal estate to convey, but only a trust executed. The trusts of the will are, to pay his daughter 60*l.* a-year until she attains twenty-one, if she remains sole ; and after that period the further sum of 40*l.* until she attains the age of thirty-one, if she so long remains sole and

(a) 4th Edit. p. 269.

(b) 2 Ves. sen. 655.

unmarried. It then goes on—and in case my said daughter *Mallett* shall either “die” (which must be rejected to make sense of the clause) shall either before she shall have attained the age of thirty-one, or afterwards, marry without the consent, &c., then she shall be paid for the term of her life 50*l.* a-year to her separate use; “and from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise that all the said freehold hereditaments shall be in trust for all and every the child and children of the body of my said daughter,” which includes all the issue. It then goes on—“and in default of such issue, then in trust.” To make sense of that it is necessary, according to grammatical construction, to go up to the verb, which is, that they shall “stand seised in trust.” But when are they to stand seised in trust? From and after the marriage without consent. The argument on the other side is, that, if words were inserted here, it would be different; but they are not there, and the whole argument is founded upon the notion that the testator intended in any event that his sisters should take. But no such intention is any where to be found. Considering the will in this point of view, namely, independent of the subsequent power to appoint in case of a marriage with consent, can it be a question whether the title of the ultimate devisee was not to depend on the condition annexed to the life estate? In the event of a marriage without consent the words are clear and plain. The grammatical construction of the words does not give it to the sisters, and it cannot be given to them against the grammatical construction except to fulfil an evident intention of the testator, and no such intention can be collected from the will. If the will rested here there could be no doubt. The questions to be considered are those which have arisen in many other cases, whether when in a series of limitations there is a condition or a contingency plainly affecting one set of a

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series of limitations, it is or is not to be carried on to the other limitations of the series; and also whether an ultimate limitation, which depends on the failure of a prior limitation, ought to be let in, when the prior limitation never comes into effect at all; and also where, though the prior limitation comes into effect, it determines not in the mode which the testator has pointed out as the expected mode of determination. There are many cases both ways; but Mr. Justice *Bayley* has given the key to them all in an interlocutory observation in the case of *Warter v. Hutchinson* (a). He there says: "In *Doe v. Shippard*, in case his daughter survived her husband, the testator created a variety of limitations; and the Court considered that as being a conditional devise, because they said the testator might have an object—he might wish to prevent her providing for her after-born children by another husband." The cases bearing on this subject are *Murray v. Jones* (b), *Jones v. Westcomb* (c), *Gulliver v. Wicket* (d), *Williams v. Chitty* (e), *Holmes v. Cradock* (f), *Parsons v. Parsons* (g), *Simpson v. Vickers* (h), and *Humberstone v. Stanton* (i). *M'Kinnon v. Sewell* is also one of the same class. That was decided on this principle, that it cannot be inferred to be a testator's intention to give the estate over if the children of A. should die under twenty-one, but not to give it over if such children never come *in esse*: therefore it was held, that, there being merely a defective specification of the modes in which the previous limitations might fail, the limitation over must take effect, notwithstanding the previous limitation had failed in a manner not contemplated and provided for. In *Murray v. Jones* (k), Sir *William Grant* says: "It is clear

(a) 1 B. & C. 749; 3 D. & R. 58.

(b) 2 Ves. & B. 313.

(c) 1 Eq. Cas. Abr. 245.

(d) 1 Wils. 105.

(e) 3 Ves. 545.

(f) 3 Ves. 320.

(g) 5 Ves. 578.

(h) 14 Ves. 341.

(i) 1 Ves. & B. 385.

(k) 2 Ves. & B. 322.

that the testatrix was not here prescribing substantive conditions in the proper sense of the word on which the original devise should depend; but was specifying events in which the former limitation would fail, and an opening would be made for that which was to be substituted in its place." So that those cases do not touch the present, which is not the question of displacing a prior limitation, or letting in subsequent devisees, upon the ground that the mode in which the prior limitation fails makes no difference, but is really a question whether the prior condition or contingency does not over-ride all. The doctrine of conditional limitations is of very early origin. The first case was *Holcroft's case* (a); and the principle which pervades all the authorities, from that case to *M'Kinnon v. Sewell*, is, that the Court will never construe words in a will to be words of limitation, where the words according to their natural import are words of condition, except it is to effect the manifest and undoubted intention of the testator. If the words according to their natural import are words of condition, they must be construed as words of condition, unless the Court can collect from some other part of the will, that the testator did not mean them to be words of condition, but only words of limitation. To apply that principle to the present case—the failure of issue cannot be connected with the marriage without consent, or *vice versa*. The one is not comprehended in the other, in the way in which the death of a child under twenty-one is comprehended in the event of the person named having no child at all. The grammatical construction makes the condition or contingency referable equally to the remainder over and to the preceding estate. In order to warrant a departure from the ordinary grammatical construction, the plaintiff ought to shew an intention on the part of the testator to the contrary; but here none

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(a) Moore, 487.

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such is shewn. The governing motive of his will was to protect his daughter from an imprudent marriage. It is submitted, that the testator's sisters were never intended to take, except in the conjoint event of a marriage without consent and a failure of issue. The Court has been asked to read the word "or" "and;" and there are many cases in which the Court, to effectuate the intention, would do so: but where is the evidence of intention here? The words upon marriage without consent govern the whole series of limitations, down to the limitation of the remainder in fee in contingency to the sisters of the testator. There has here been a partial intestacy. The testator clearly and advisedly left a portion of his property to be dealt with by the law; he makes no will as to the rents which shall accrue from the time when his daughter shall attain thirty-one unmarried. Until she shall die or marry he makes no provision for it, because the law would provide for it; and the same feeling has actuated him in other parts of the will. In the event of a marriage without consent, the estate is strictly settled on the issue of the marriage; nay, more, if there should be no issue, and to guard against her husband persuading her to give him the estate by means of a fine or otherwise, he settles it on his sister. Even the 50*l.* a year is settled to the daughter's separate use. Then, what is there inconsistent with holding it to be his intention, that, if his daughter should die unmarried, she was to have the disposition of her own property? There is no intention shewn to exclude her from it. The children were to take if she married without consent; and, in default of issue of such a marriage, the sisters were to take. When once a marriage without consent takes place, the condition is performed, and the estate becomes fixed to the series of limitations which exhaust the fee.

The argument has hitherto proceeded as if the will had not contained the subsequent proviso; but let us now consider it with that proviso in the will. The testa-

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tor reasons thus—" I have protected my daughter in this way, but a case may arise of a proper marriage with consent, and in which my trustees may think a settlement prudent; and in that case, I give them power to interfere." Consider the subsequent clauses with this view. The will is, " Provided always, that, in case my daughter shall, in the lifetime of *W. T.*, marry with his consent, or, after his decease, with the consent of *T. D.*, or the legal representative of the survivor, then it shall and may be lawful for them, or the survivor of them, or the legal representative of the survivor, to convey (which is a mere option) the said freehold messuages, &c. unto such person and for such uses as they shall think proper, so that the same is conveyed and assigned upon trust only, and for the use of my said daughter, and such husband as she shall marry with such consent as aforesaid, during their joint lives, and the life of the survivor of them, but not without impeachment of waste, with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions as they my said trustees, or the survivor of them" (there is here an accidental inaccuracy, as he does not speak of the representative of the survivor), " shall think proper to direct and appoint; and, for want of such direction, limitation, or appointment, in such shares and proportions as are hereinbefore limited respecting the same." That is, to the issue, and nobody else. If he had intended to give the trustees a power of going beyond making the settlement on the daughter and her husband and issue, he would have said, " and for default of such issue, to the uses and upon the trusts hereinbefore declared respecting the same." But he has advisedly left the ultimate remainder undealt with, as the daughter would then have made a proper marriage. The Court cannot go out of the words and break through the rules of grammatical construction, and transpose a sentence from one part of the will to another, without an

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evident necessity, which in this case no where appears. Let us suppose that the daughter had married with consent, and the trustees had omitted to execute the power of making a settlement; and suppose she had issue of that marriage: upon the construction contended for by the plaintiff, such issue never could have taken, though the issue of the objectionable marriage would. All the issue are provided for only in a given event. It cannot be held that the issue is partially provided for, and then that the sisters are to take on an indefinite failure of all the issue of whatsoever marriage: that, of course, would be void for remoteness. The argument on the other side is that which was used in *Jones v. Westcombe*, and that class of cases, viz. that, wherever the preceding limitation fails of effect, by whatsoever mode, the destruction or determination of it lets in that which is to come in its place. Then, this is a case, in which, if that argument is correct, the issue of a marriage approved of by the testator, the issue of his favourite child, must have lost the estate in favour of those collateral relatives. No issue are to take in any event, unless on a marriage without consent, by the first clause. This is important, as, if the defendant is right, it decides the whole case. By the first clause, there is never to be appointment, appointor, or appointee, unless there is a marriage without consent, which over-rides the whole. But for the intestacy, there is nothing out of which the issue of a marriage without consent could take. Now, assuming that the power was never executed, and that there is a marriage with consent—according to the plaintiff's argument, the issue of that marriage could never take: they are absolutely disinherited, unless the defendant's construction is right. The plaintiff says, true it is no issue are to take but upon a marriage without consent; but then, if there be no issue of a marriage without consent, there is nothing precedent to the limitation to us, and, by whatsoever mode the limitation is out of the case,

the other is let in. The inevitable consequence of that is, that, if there had been no settlement, the issue of a marriage with consent would have been disinherited in favour of the collateral relatives. Is that a construction to which the Court will come, and for which they will force the language of the will, and interpose phrases? [*Alderson*, B.—The plaintiff contends that there being a settlement which disposed of the property as here, the sisters inherit as soon as the issue provided for by that settlement is at an end; but, if they had made no settlement, she would have taken it altogether, and then the limitation over would have been defeated by that omission.] Entirely so. The settlement only provides for the daughter and her issue by that particular marriage, leaving the ultimate remainder totally unprovided for. If that settlement exhausted the power, the issue of another marriage was unprovided for. The testator authorizes the trustees to convey to such persons and uses as they shall think fit, “so that,” by which every other member of the sentence is governed, “so that the same is conveyed and assigned upon trust only, and for the use of my said daughter *Mallett*, and such husband as she shall marry with such consent,” &c. Every limb of that sentence is governed by “so that;” it is a condition to be inserted in the conveyance, if a conveyance shall be made; the whole clause is inoperative if no conveyance is made. Put the case of a marriage with consent without a settlement. This is a settlement upon a marriage with consent, but confined to the issue of the marriage with Mr. *Colt*. Suppose he had died leaving her a widow without issue, there is no power of making another settlement, as the trustees have not the power to make settlements *toties quoties*. The power being exhausted, she marries again without any further settlement: then, how are the issue of that marriage to take? Then she takes as heir-at-law, and would be entitled to the fee of the estate. [*Parke*, B.—Would not the proper

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settlement under that proviso be a settlement on the issue of the body generally?] Certainly. Therefore it is open to the argument that it was a bad or ineffectual execution of the power. It is, however, sufficient to shew, that the case is open to these difficulties; it would still leave it the case of a non-execution of the power. In that view it is only capable of being put upon the construction that this second clause provides for the issue of a marriage by consent in any event. But it is submitted that it does not; and that it only directs what shall be the terms of a settlement if made. But, even if it were conceded that this clause is a provision in any event for all the issue, still it would not let in the sisters, except by transposing this clause and transplanting it from one part of the will into the middle of a series of limitations, and reconstructing the entire sentence for the purpose of disinheriting the heir-at-law. But what is the supposed obvious necessity of doing it? To deprive the daughter of the control of her own estate in the event of the issue failing. The only object of the testator was to protect his daughter from the consequences of an imprudent marriage, with which this ultimate remainder had nothing to do. The second clause does not touch the case of the sisters; it does not carry it beyond the issue. The testator has only said that his sisters shall take on failure of issue of his daughter on a marriage without consent.

There are some cases which may be supposed to bear against the defendant, but which in reality do not. The case of *Davis v. Norton* (a) was one calculated to try the rule to the utmost. Mr. *Fearne*, in speaking of that case, says (b): "The construction in these cases as to the restriction of a contingency to the estate first hinged on it, appears to depend on the testator's apparent intention, but it extends it further; for, wherever there is no

(a) 2 P. Wms. 390.

(b) *Fearne*, Cont. Rem. 9th edit. 236.

apparent intention in view in this respect between such estate, and those which follow, the contingency, it seems, will equally affect the whole ulterior train of limitations;” and then he refers to *Davis v. Norton*. In *Doe v. Shippard*, Lord Mansfield, in delivering the judgment of the Court, says: “The question is, whether the limitations over are to take effect in the event which has happened of *Thomas Shippard*, the husband, having survived his wife, the testator’s daughter. Now, there are no express words limiting the estate over on that event, and yet it is plain that it was foreseen by the testator, for he gives the rents and profits to the husband after the death of the wife. The testator then proceeds to say, ‘And in case my said daughter *Rachel* shall happen to survive the said *Thomas Shippard*, her husband, then upon trust,’ &c. The Court may supply the omission of express words, *if they find a plain intent*, but, *unless that is the case, they cannot do it*; and, upon full consideration of the whole of this will, we do not find there is sufficient for us to gather such intent, so as to warrant us in supplying the omitted words: guesses may be formed, but that is not enough. Perhaps *quod voluit not dixit*. We cannot make a will for the testator. Conjectures may be made both ways. The argument which was drawn by Mr. *Haworth*, from the devise of the *Lancashire* estate, turns the other way. There may be a reason why the testator might not intend the limitations over to take place except in the event of the daughter’s surviving her husband, *viz.* to secure the estate in tail to his grandson, *Hewitt Shippard*, against any preference his daughter might shew to her issue by any subsequent husband. If she did not survive him, there could be no danger of that sort, as the estate would descend to *Hewitt Shippard*. This bears no resemblance to the famous case of *Jones v. Westcomb*,” (where the child was never born), “for there the intention was clear, that, failing the child, the estate

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was to go over to the devisees in all events." In *Doe d. Radcliffe v. Bagshaw* (a), there was a devise to *Margaret* (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son; and for default of such issue, to the second son of her body, "if living at the time of her death," and the heirs male of such second son, &c., and for default of such issue male, remainder to *A.* *Margaret* had one son who died in her lifetime, leaving a son: and it was held that *Margaret* took only a life estate, and that neither her son or grandson took any estate, but that the remainder to *A.* took effect. Now, that was a strong case; for, there the effect of adhering to the words was to disinherit the testator's own issue in favor of collateral relatives. In this case the Court is called upon to depart from the words in the will for the purpose of disinheriting the issue. There are a great variety of cases in which Judges have expressed their regret at being obliged to decide according to the language, but have still held themselves bound to do so. *Williams v. Chitty* (b), *Holmes v. Cradock* (c), *Doe v. Brabant* (d), *Parsons v. Parsons* (e), *Simpson v. Vickery* (f), *Humberstone v. Stanton* (g). But this is not a case in which, by applying the words, the testator's own issue would be deprived, but in which the Court is called upon to cut down and diminish the property and rights of the testator's only child in favor of collateral relatives.—The judgments of Lord *Eldon*, in *Brown v. Higgs* (h), and *The Duke of Marlborough v. Lord Godolphin* (i), were also cited.

Temple replied, citing the judgment of Lord *Eldon* in

(a) 6 T. R. 512.

(b) 3 Ves. 545.

(c) 3 Ves. 317.

(d) 4 T. R. 706.

(e) 5 Ves. 578.

(f) 14 Ves. 341.

(g) 1 Ves. & B. 385.

(h) 8 Ves. 561.

(i) 2 Ves. sen. 61.

Bootle v. Blundell (a), and *Sugden on Powers*, 405, and relying upon *M'Kinnon v. Sewell*, which, he contended, was not distinguishable from the present case.

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Cur. adv. vult.

In *Hilary* Vacation, Lord ABINGER, C. B., delivered the judgment of the Court.—This was a bill filed for the purpose of obtaining possession of an estate which the plaintiff claims under a clause in the will of Mr. *James Bowman Clarke*. The case came before me first upon a motion for the production of papers and title-deeds; and upon that motion I certainly was of opinion that the plaintiff was entitled to the remainder in this estate upon the death of the testator's daughter. The will, however, was obscure, and of difficult construction, and I refrained from pronouncing any judgment upon it till I had consulted another member of the Court, my Brother *Parke*, to whom I sent it without any comment whatever, or any suggestion as to what my opinion was. He returned it to me in two or three days, with rather a strong opinion in confirmation of my own; and I in consequence delivered my judgment in favour of the claim of the plaintiff. The case was afterwards revived upon a motion for a receiver; and, as the will was to be discussed, and the plaintiff's title to come under consideration a second time, I thought it expedient that it should be discussed before the full Court. The case accordingly underwent a very solemn and deliberate argument, and the Court have desired me to express their obligation to the counsel on both sides for their able, elaborate, and ingenious arguments upon that occasion. Many new lights were thrown upon the consideration of the subject, and some circumstances in the will were brought more distinctly to our attention than had occurred to me upon the first argument; and I am not ashamed to

(a) 1 Merivale, 219.

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confess that I have drawn, upon the second argument, a conclusion at variance with that which I drew from the first. I am authorized by my Brother *Parke* to say the same thing for him. He, also, upon the second argument, found reason to change his opinion; and I have now to state the unanimous opinion of the Court in favour of the defendant, Sir *John Colt*.

Upon the first occasion I thought that there was no doubt, nor do I now doubt, that, if the testator's attention had been called to the particular case which has occurred, and which gives rise to this question, he would have declared his intention to have been in favour of his sisters. The will still appears to me to be obscure, and no opinion which can be given upon it can be one of very great confidence. It is very much disjointed; the clauses are thrown about in very great confusion; and, in order to make them intelligible, the best mode is to collect the different members of it, and join them together. I have taken some pains to do so, and likewise to abbreviate many of the clauses; and it appears to me that when the various scattered provisos and exceptions are put together, they will assume something of this form: —

The testator, Mr. *James Bowman Clarke*, bequeathed the whole of his estate, both freehold, leasehold, and personal, to *Toldervy* and *Davis*, whom he made his executors. He gave them power to receive the rents and profits; to mortgage the real estate, for the purpose of raising money for the payment of fines upon renewing the leasehold estates; to renew the leasehold estates; to invest the money raised, in new purchases of either leasehold or freehold property; to mortgage for the purpose of raising money to accumulate; and to invest the accumulations in new purchases, and in the mean time to deposit them in the *Bank of England*. In short, he gave them very great powers over this estate; and declared them to be trustees for the objects of the will. The objects of the will are

stated to be these: to the intent and purpose that his daughter *Mallett* should, till twenty-one, if sole and unmarried, receive annually the sum of 60%.; and from time to time thereafter, till she should attain the age of thirty-one, being still sole and unmarried, receive an additional annuity of 40%. It appeared that the testator had but one daughter. Then there comes, very much disjointed from that bequest, in a remote part of the will, this proviso—"Provided that the trustees shall be authorized and empowered, not only during her minority, but at any time or times afterwards, till she arrives at the age of thirty-one, and so long as she is unmarried, *but not otherwise*, as they shall think fit, to pay and apply any further sums beyond the two annuities of 60%. and 40%. for her maintenance and education, or her advantage, so as they do not exceed the amount of the annual rents and profits." So that, in effect, this was giving to her these annuities at all events till she arrived at the age of thirty-one unmarried; and, at the discretion of the trustees, giving her the benefit of the whole of the rents and profits till she came to that age, if she remained unmarried, but not otherwise. Now, those words "*but not otherwise*" are very important, because they shew that, if she married, the trustees were not to give her more than what was otherwise provided for her. Then there is a proviso that if his daughter should, either before or after thirty-one, marry without consent of the trustees, or the survivor of them, she should be paid an annuity for her life only of 50%, and not the other two annuities of 60%. and 40%. before mentioned. "And from and immediately after the marriage of my daughter, without such consent as aforesaid, I direct that the said estates" (the first clause relates to the freehold estate, but the subsequent parts of the will throw together the whole, and therefore I comprise the whole in one statement here) "shall be in trust for all and every the child and children of the body of my daughter lawfully to be be-

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gotten, in such shares and proportions, manner, and form, as the trustees shall from time to time direct and appoint, with or without power of revocation; and for want of such direction, in trust for such child or children, equally to be divided between them, as tenants in common, and the several and respective heirs of the body of such child and children lawfully issuing, with cross-remainders; and if but one such child, then to that child alone, and the heirs of his or her body lawfully issuing." In default of issue of the children, the testator devises the property to his sisters. By a subsequent proviso, the testator directs that in case his daughter should marry without consent, and have issue, that issue should, at the discretion of the trustees, have a provision for their maintenance and education during their minority, out of the estate so bequeathed to them, until they should be respectively entitled to their respective shares of the property under the will.

These are the important parts of the will, with the exception of a proviso for the case of the daughter's marriage with consent, to which I shall now advert. That proviso is likewise placed in a remote part of the will, and gives to the trustees power to convey the estates to new trustees, upon the trusts there declared: and, supposing the conveyance to be made in pursuance of the proviso, the effect of it is to give an estate for life, with benefit of survivorship, to the husband and the wife, and then an estate tail to the issue of the body of the wife, as tenants in common, in such shares and proportions as the trustees chose to appoint; and, in default of appointment, in such shares and proportions as before; that is, to the children as tenants in common of an estate tail, which they would take as purchasers. But that clause is not followed by any limitation of the remainder after the estate tail. Upon the former argument, it struck me that the testator's intention to provide for the sisters was very apparent. In the first bequest, he had devised the remainder expectant

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upon the estate tail in the children, to the two sisters; and I thought that he had a design to provide for his sisters this estate in remainder at all events. Although the will was expressed obscurely and ambiguously, it had occurred to me that by putting the proviso for the case of a marriage with consent into a place which I thought I could discover to be its proper place, that would remove all difficulties, and would effectuate the testator's intention, that the remainder to the sisters should take effect after the estate tail given to the children, either in the case of a marriage without consent, or a marriage with consent, and that the proviso was merely to let in the estate for life in that case. That was the impression under which I certainly gave my first opinion; but, upon the elaborate argument which we have had upon the subject since, I have seen reason to change that opinion.

Now, let us see what it is that the children take.—The estate is given to them expressly in case of a marriage without consent. The remainder is to take effect after that estate expires, and is dependent upon that estate, and no other. That is the first remainder, and it begins with the words, "and for default of such issue." Now, it is admitted on both sides, and I think it cannot be denied, that the word "issue" there, means issue of the children. It cannot mean issue of the daughter, because no estate for life or otherwise is given to the daughter; and, therefore, a limitation to the sisters, after a general failure of issue of a person who was to take no interest on which the remainder could depend, would have been too remote. What is given to the daughter, in case of her marriage without consent is, an annuity of 50%, and nothing more; and immediately the children are born, they take estates tail, liable to be modified by any direction or appointment the trustees may make. If they make no appointment, they take estates tail, as tenants in common with cross-remainders. Then, upon what does the

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remainder to the sisters depend? It depends upon that estate tail. If that estate tail is taken away, the remainder is taken away.

The question has been argued on behalf of the plaintiff, as if the present ought to be ranged under that class of cases in which it is contended that the case of *Murray v. Jones* (a), and the more modern one of *Mackinnon v. Sewell* (b), are comprised. It has been said, that those cases are an authority for the proposition, that the Court will not, where it is contrary to the apparent intention of the testator, allow a condition, which in words may appear to be a preliminary condition of vesting the estate, to operate upon all the limitations following that condition. Now, it appears to me, that that is not the true character of those cases. Those cases do not furnish questions upon the operation of a condition upon subsequent limitations, but they are mere cases respecting the construction of the condition itself. The case of *Murray v. Jones* arose upon the will of Lady *Bath*. The person who drew her will used a multitude of unnecessary words, for the purpose of giving to Mrs. *Fawcett* the personal estate, in case Lady *Bath* should not have any second child that arrived at the age of twenty-one, or, being a daughter, married before that age. The drawer of the will had perplexed himself by putting all possible cases, when he meant to state only one case, namely, her having no second child who should arrive at the age of twenty-one, or daughter who should marry before that age. Sir *William Grant*, who decided that case, put it upon the true ground. He said, she meant to give the estate to Mrs. *Fawcett* and her children, in case she, the testatrix, should have no second daughter or son that arrived at the age of twenty-one. Why, she had no children at all; therefore, she had none that arrived at the age of twenty-one. Therefore he interpreted

(a) 2 Ves. & B. 313.

(b) 2 Myl. & K. 202; C. P. Coop. 224.

the condition, however obscurely expressed, to include the case of her dying without having any children who should live to be twenty-one; and he made use of this remarkable expression:—"that, if there were any gradations in the performance of the condition, she had more than performed it;" for, whereas she meant to give the estate over, if she left no second child that arrived at the age of twenty-one, whereas she had left behind her no child at all, therefore she could not have left one that arrived at the age of twenty-one. He illustrated her meaning further, by shewing that, in another part of the will, in declaring who should be the ultimate object of her bounty after Mrs. *Fawcett* and her children, in case they failed to exist, she makes provision, if she herself should leave no children behind her, and Mrs. *Fawcett* should leave no children behind her, that then the estate should go to a third party. That clearly shews that her intention was to give the estate to Mrs. *Fawcett* and her family, in case she, Lady *Bath*, should die without leaving any children. It is perfectly plain, therefore, that that was the interpretation of the condition itself, shewing what the condition meant; and therefore, that no question could arise there of a condition operating upon a subsequent limitation. The condition did operate on a subsequent limitation, and there the condition was what the Master of the Rolls interpreted it to be, and not that for which the other party contended, namely, that she should actually leave a child living after her death; that was no part of the condition. The case of *M'Kinnon v. Sewell* was one precisely of the same nature, and therefore requires no further observation.

On the other side, it was argued by the counsel for the defendant, that this case ranges itself under that class of cases in which a rule of construction, founded on plain common sense, has been illustrated, namely, that, where a condition precedes a certain series of limitations, each of

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that series must be taken to be affected by that condition, unless there is a manifest intention upon the face of the will to be collected to the contrary; that is to say, in other words, you must follow the plain grammatical construction of the will in giving effect to the limitations, unless you find by some other parts of the will that the testator's intention was to deviate, in any one particular, from that plain grammatical construction. The question, then, is, whether the condition upon which the estate tail is limited to the children, does not also apply in this will to the limitation in remainder to the sisters. It appears to me, upon the words of the instrument, that it clearly does. But I think it is hardly necessary to go into that class of cases to determine the construction of this will, as far as it depends on the first and second limitation, because, as I before observed, the estate tail is given to vest in the children immediately as they are born, and is given upon the express condition, and no other, of the marriage of the mother without consent, and therefore the remainder over is made to depend upon that estate tail. Why then, if the condition was not performed, that estate tail could not have taken effect; and if you take that estate tail away, what becomes of the remainder? Now if it were legitimate to transfer the proviso for a marriage with consent, immediately after the limitation to the children upon a marriage without consent, and to make it part of the same sentence, then undoubtedly the limitation over to the sisters would depend upon the one estate tail as well as upon the other; and if it depended only upon that, I own I should have had the courage, in order to meet the apparent intention of the testator, to have transferred the proviso in that manner, under the authority of several cases well known to gentlemen who are in the habit of considering these subjects, in which the opinion, rather widely laid down by Mr. Justice Buller, in *Doe v. Wilkinson* (a), has,

(a) 2 T. R. 223.

however, been acted upon; where he says that the Court may mould and transpose the clauses of a will, for the purpose of giving effect to the intention of the testator. But I find this extraordinary fact in this will—I find a clear case in which the sisters could by no means have any remainder at all, and that is this: the testator has provided for his daughter till she arrives at the age of thirty-one unmarried; and he has provided for her also if she marries before or after thirty-one; but, if she remains single from thirty-one to the day of her death, the only provision made for her is a provision by law; there is no provision by this will. It was argued in that case that he must be supposed to intend to die intestate. I do not think he intended any such thing; but a man may, without intending to die intestate in effect, make no provision at all but what the law makes. It appears to me a confusion of ideas to say that a man intends to die intestate when he makes a will, because he probably intends to devise everything; but it happens very often that he omits to make a devise of a particular interest; and if it is a *casus omissus*, a Court of law cannot supply it afterwards. Now, then, suppose the daughter had never married at all, why, the object of the trusts given to the trustees being to provide for a particular person, the daughter, her children, her husband, and, in one case, for the persons in remainder, who are specified in the will, if she does not marry at all, there is an end of their trust, except that which the law raises for the benefit of the daughter. What estate, then, does she take? Not an estate for life—she takes no particular estate—and therefore no remainder can depend upon her life. She takes no estate tail, and therefore no remainder can depend upon that estate. She clearly takes an estate in fee, liable, if you please, to be divested by her marriage, with or without consent, after thirty-one; but yet, if she remains unmarried after thirty-one, and dies, it is clear that she dies seised of an equitable estate in fee in

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all these premises; and it goes, therefore, to her heir-at-law, or is devisable by her will.

There is one case, therefore, where clearly the testator has omitted to make any provision for his sisters at all, or to give any such estate as could support any remainder to the sisters. Well, then, it is asked, and I think very properly asked, as one case of that sort was plain, manifest, and incontrovertible, why should not the other case also of a marriage with consent be ranged under the same class of cases either of a design to die intestate, if you please so to put it, or of a *casus omissus*; and why should you supply it in one case more than the other? Why, it is very remarkable that in the proviso for a marriage with consent, the estate tail is given to the children in a different manner. The first estate tail vests in them the moment they are born. They take as purchasers in both cases; but in the first case they take the estate tail from the moment they are born; in the other, the estate is given to the husband and the wife for life, and for the life of the survivor; and then, the estate tail depending on that estate for life goes to the children. Undoubtedly that would make no difference, if it were followed, either in words or by construction, with a remainder over to the sisters. But that proviso for a marriage with consent is followed by no such remainder to the sisters. Now, where shall I put it in the will? What right have I to say, as I first thought I had, that I can put it before the limitation of the remainder to the sisters? Suppose he himself had inserted it in an earlier part of the will, and he might still have put it immediately after, instead of before, the limitation in remainder; if he had so done, the same difficulty would have occurred as occurs now, though placed after it at a greater distance. I cannot say, therefore, with any certainty, that he intended that the limitation to the sisters of a remainder dependent on a particular estate tail, granted upon a certain condition

only, was intended by him to follow the estate tail granted upon another condition, and in a different part of his will; he not having followed it out by stating any remainder to the sisters after. If I were asked my opinion of the intention of the testator, if the case had been suggested to him, I should say, that, if he had been told, "You have made a provision for your sisters in case of a particular marriage without consent; but in the other parts of your will you have left no provision for them, as to your estates bequeathed to your daughter in case she should not marry, or should marry with consent, and die without issue;" I should think it very probable indeed he would have said—"Then supply that omission, and give them the remainder over." But a Court of justice has no right, in interpreting a will, to make a probable conjecture of what a testator would have done in a particular case, and then to do it for him, when there are no words in the will to justify that course. We are bound to find out the intention of the testator; and, though that intention be expressed obscurely or ambiguously, yet if it is expressed in words somehow or other, or expressed by so strong an implication that you cannot avoid seeing he contemplated the thing and meant it, though he has not expressed it accurately; in that case you are bound, if you can find such intention obscurely expressed or clearly implied in the will, to give effect to it, and very often to mould and modify the will in such a way as to give effect to the intention that he either clearly has expressed or intended to express. But, if the words do not express any such intention, it is not because you can conjecture such intention to be highly probable, that you are to insert words in order to give effect to it. The testator has not done what he probably would have done, had the case occurred to him; but, if he has not done it, a Court of law has no right to do it for him. It therefore appears to me that we cannot, by anything but a probable conjec-

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ture, which, in my opinion, the Court has no right to act upon, insert this proviso immediately before the limitation over of the remainder to the sisters. And if we cannot do that, then the limitation over to the sisters clearly depends upon the conditional estate tail given to the children; and as that conditional estate tail never existed in the case that has occurred, of course the remainder falls to the ground.

I ought to state that it is the opinion of some of the Judges, and, for aught I know, all of them—certainly, two have expressed it to me—that the proviso for making a settlement in the case of a marriage with consent was not imperative upon the trustees. I own that I myself do not entirely concur in that opinion. I am inclined to think, that, although the words used in that proviso are, “it shall and may be lawful,” the trustees would probably have been compelled, if the necessity had arisen, to make that conveyance, or to hold the estate in trust for the children. That depends on a class of cases of which *Brown v. Higgs* is a leading authority in modern times. Upon that, and other cases of the same nature, I think it cannot be doubted, that, where an apparent power is combined with a trust, if the power is not executed, a Court of equity will execute the trust in some manner; and therefore, that, if the trustees in this case, supposing children to have been born after a marriage with consent, had omitted to make any conveyance at all, a Court of equity would have allowed the children to have the benefit of that clause in the will, considering it as a trust combined with a power. However, the judgment of the Court in this case must be given without reference to that interpretation; because, as the other Judges are of opinion that it was a matter of mere discretion in the trustees, if they are right in that opinion, there can be no doubt at all that the plaintiff would have no claim. But the ground upon which we are all agreed in giving judgment for the

defendants is this, that we think we cannot indulge in conjecture for the purpose of introducing one proviso into another place than where it exists in the will, and into that precise place which would make it give effect to the limitation over of the remainder to the sisters. We think we cannot do that but by conjecture, which we have no right to indulge in; and upon this ground the bill must be dismissed.

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Decree accordingly.

NOTE.

IN the case of *Day v. Day*, ante, p. 39, *R. V. Williams*, on a subsequent day, renewed his motion for a rule for judgment as in case of a nonsuit, urging that it would be desirable to settle the practice, and the Court granted him a rule. On consideration, however, he declined to draw it up, and no more was heard of the case.

END OF HILARY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EASTER TERM, 6 WILL. IV.

REGULA GENERALIS—EXAMINATION OF ATTORNEYS.

Regulations approved by the Judges in Easter Term, 1836, for the Examination of Persons applying to be admitted as Attorneys of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the Rule of Court made in Hilary Term, 1836.

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WHEREAS by a rule of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, made in *Hilary Term*, 1836, it was ordered, that the several masters and prothonotaries for the time being of the said courts respectively, together with twelve attorneys or solicitors, should be appointed by a rule of Court in *Easter Term* in every year, to be examiners, for one year, of persons applying to be admitted attorneys of the said Courts, any five of whom (one whereof to be one of the said masters or prothonotaries) should be competent to conduct the examination; and that from and after the last day of the present *Easter Term*, subject to such appeal as thereafter men-

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tioned, no person should be admitted to be sworn an attorney of any of the said Courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time should be specially extended by the order of a Judge: And it was further ordered, that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the Judges; and that, until further order, such examinations should be held in the hall or building of the incorporated Law Society of the United Kingdom, in *Chancery Lane*, on such days (being within the last ten days of every term) as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three courts, and desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall:

And whereas, by a rule of all the said courts, made in this present *Easter Term*, it was ordered, that the several masters and prothonotaries for the time being of the said courts respectively, together with *Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White*, and *Edward Archer Wilde*, gentlemen, attorneys, should be, and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted attorneys of all or either of the said courts from and after the last day of that term; and that any five of the said examiners, one of them being one of the said masters or prothonotaries, should be competent to conduct the said examination, in

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pursuance of and subject to the provisions of the said rule in *Hilary* Term last :

In pursuance of the said rules, the following regulations for conducting the said examinations have been submitted to and approved by the judges of the said courts.

1. That every person applying to be admitted an attorney of any of the said courts pursuant to the said rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left with the secretary of the said incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

2. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct,

or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

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4. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed papers, touching his fitness and capacity to act as an attorney.

5. That upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters or prothonotaries,) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners present, or the major part of them, shall certify the same under their hands in the following form, *viz.* :—

“ In pursuance of the rules made in *Hilary* and *Easter* Terms, 1836, of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, We, being the major part of the examiners actually present at and conducting the examination of *A. B.*, of &c., do hereby certify, that we have examined the said *A. B.*, as required by the said rules: and we do testify that the said *A. B.* is fit and capable to act as an attorney of the said courts.”

(Signed by all the Judges).



Questions as to due Service, to be answered by the Clerk.

1. What was your age on the day of the date of your articles?
2. Have you served the whole term of your articles at the office where

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the attorney or attorneys to whom you were articulated or assigned carried on his or their business? and if not, state the reason.

3. Have you, at any time during the term of your articles, been absent without the permission of the attorney or attorneys to whom you were articulated or assigned? and, if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articulated or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

Questions as to due Service, to be answered by the Attorney.

1. Has *A. B.* served the whole term of his articles at the office where you carry on your business? and, if not, state the reason.

2. Has the said *A. B.*, at any time during the term of his articles, been absent without your permission? and, if so, state the length and occasions of such absence.

3. Has the said *A. B.*, during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said *A. B.*, during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said *A. B.*, since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney and solicitor?

And I do hereby certify that the said *A. B.* hath duly and faithfully served under his articles of clerkship (*or assignment, as the case may be,*) bearing date &c. for the term therein expressed; and that he is a fit and proper person to be admitted an attorney.

The following notice has been posted up in the Common Law Courts, and at the Judges' Chambers, and all the law offices: —

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EXAMINATION OF ATTORNEYS UNDER THE RULES OF HILARY
AND EASTER TERMS, 1836.

THE articles of clerkship, and answers to questions touching the due service and good conduct of persons applying to be admitted attornies, are to be left with the secretary of the incorporated Law Society, at the Hall in *Chancery Lane*, within the first seven days of term (*viz.* between the 23rd and 30th *May* inclusive).

The first examination will take place at the Hall of the incorporated Law Society, on *Saturday*, the 4th of *June*, and commence at ten o'clock in the forenoon. The applicants are required to attend in the Hall at half-past nine on the day of examination.

Application for further information may be made to the secretary.

17th *May*, 1836.

R. MAUGHAM.

Exparte JAMES PARRY.

ARCHBOLD moved for the re-admission of an attorney, without making any affidavit, and without putting up any notice. The applicant had been an attorney practising in the *Welsh* Courts of Great Session, and, on the passing of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, was admitted in this Court, and also in the *King's Bench*. He afterwards discontinued practising, and ceased to take out his certificate for some years; but he had since been re-admitted in the *King's Bench*. That was sufficient, on the authority of the case of *Ex parte Yates* (a), to entitle him to be re-admitted in this Court as of course.

An attorney who has been admitted, or re-admitted, in another Court, has a right to be admitted or re-admitted in this Court as of course, without giving any notice or undergoing any examination.

PARKE, B.—The party being already an attorney of the

(a) 1 Dowl. P. C. 724.

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other Court, has no doubt a right to be admitted in this Court as of course.

Motion granted (a).

(a) On a subsequent day, the Court took occasion to state that the new rules as to the examination and admission of attorneys would not apply to those who were already admitted in any of the Courts. A great number of attorneys of the other Courts nevertheless presented themselves to be admitted in this Court previously to the last day of the term, when the new rules took effect.— See the 11 Geo. 4 & 1 Will. 4, c. 70, s. 10.

CROSBY and Another v. CLARKE.

An affidavit of debt in an action by the indorsee against the drawer or indorser of a bill of exchange, must shew a default by the acceptor.

J. J. WILLIAMS moved for a rule to shew cause why the defendant should not be discharged out of custody on entering a common appearance, on the ground of the insufficiency of the affidavit of debt. The action was by the indorsee against the drawer of a bill of exchange; the affidavit stated that the defendant was indebted to the plaintiff in the sum of 100*l.* on a certain bill of exchange drawn by the defendant, and accepted by *A. B.*; that the said bill of exchange was due and unpaid at a certain day now past, and that the sum of 100*l.* thereby made payable was still due and unpaid by the defendant to the plaintiff. He contended that the default of the acceptor was not sufficiently averred.

Dowling shewed cause in the first instance, and argued that the affidavit was sufficient.—It is certainly not necessary, in an affidavit against the drawer, to aver presentment to the acceptor; *Witham v. Gomperts* (e); and it must be equally unnecessary to introduce any words equivalent to an averment of presentment, or any other of the

(a) 2 C. M. & R. 736.

circumstances which constitute a default in the acceptor. It was undoubtedly held, in *Buckworth v. Levy* (a), that the affidavit must shew a default in the acceptor; and that case was acted upon in *Cross v. Morgan* (b) and *Banting v. Jadis* (c); but as the latter cases were decided altogether on the authority of *Buckworth v. Levy*, they can hardly be considered as additional authorities for the same proposition. In *Weedon v. Medley* (d), also, it was held that an averment of presentment was not necessary; and the observations made by the Court in that case materially detract from the authority of *Buckworth v. Levy*. To the argument that the affidavit ought to have alleged a presentment, as otherwise no default was shewn, *Alderson, B.* answers, "So the drawer is not liable without notice; but none of the forms state that." And *Bolland, B.* intimates it to be sufficient if the affidavit states that the bill has become due, and has not been paid. [*Alderson, B.*—The point then present to my mind was, whether an averment of *presentment* was necessary; I did not advert to the point whether the default of the acceptor should be shewn.] In a very recent case, *Irving v. Heaton* (e), the Court of *Common Pleas* has decided expressly that it is *not* necessary to shew the default of the acceptor. The affidavit there was to the same effect as in the present case, and was held sufficient. The cases, therefore, being thus conflicting, the question may be considered as if there were no decision at all upon the point. Now, the defendant, the drawer, cannot be *indebted* to the plaintiff on the bill unless the acceptor has made default. The statement, that he is so *indebted* is a sufficient allegation that every thing has been done which would constitute him in law a debtor to the plaintiff in respect of

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(a) 7 Bing. 251; 5 M. & P. 23;
1 Dowl. P. C. 211.
(b) 1 Dowl. P. C. 122.

(c) 1 Dowl. P. C. 445.
(d) 2 Dowl. P. C. 689.
(e) 4 Dowl. P. C. 638.

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the bill. [Lord *Abinger*, C. B.—The allegation that the defendant is indebted may, perhaps, be a sufficient allegation that he has had *notice of dishonour*, because it is a mixed question of law and fact what constitutes a due and legal notice, and it might be very difficult to swear positively that the defendant had received due notice; but surely the affidavit ought to shew the default of the acceptor. *Parke*, B.—How does it appear that the deponent would be indictable for perjury, if the bill had never been presented or refused payment?] Because otherwise the defendant could not be indebted. Presentment and notice, though they may differ in point of form, and in the manner of proof, are equally necessary parts of the plaintiff's title, and must equally be shewn in his declaration. He cannot arrest or recover against the defendant for anything which is not shewn to be in all respects a *legal debt*. If therefore he swears to a debt, it must be inferred that it is a legal debt.

J. J. Williams, contra.—In *Witham v. Gompertz*, the affidavit was in the usual form, and stated that payment of the bill had been refused by the acceptor; it did therefore shew a default in him; but here there is no such averment, nor any words whence it can be inferred. *Buckworth v. Levy* is an express authority that this affidavit is insufficient, and has been repeatedly confirmed—*Cross v. Morgan*, *Banting v. Jadis*. And in the latter case *Patteson, J.*, so held after conference with all the other Judges of the Court of *King's Bench*. *Weedon v. Medley* only decided the same point as *Witham v. Gompertz*, that it was not necessary to allege presentment.

LORD ABINGER, C. B.—It appears that the case of *Buckworth v. Levy* has been confirmed by my Brothers *Littledale* and *Patteson*, and that in concurrence with the

opinion of several others of the Judges ; I think, therefore, we ought to adhere to that decision.

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PARKE, B.—The authorities against the sufficiency of this affidavit are the cases of *Buckworth v. Levy*, *Cross v. Morgan*, and *Banting v. Jadis* ; the last being in fact a decision, after consideration, by the whole Court of *King's Bench*. *Witham v. Gompertz* is no authority in its favour ; for, all that was there decided was, that an allegation of refusal by the acceptor to pay was sufficient, and that the affidavit need not go into the particular circumstances of presentment, or notice, which are necessary to give the plaintiff a right of action against the drawer. The only authorities, therefore, in support of the present affidavit are *Weedon v. Medley* and *Irving v. Heaton*. The former case was clearly decided on the mere ground that the want of an averment of *presentment* was not a sufficient objection, and the Court did not look into the affidavit to see whether there was an averment of *refusal*. Then *Irving v. Heaton*, as appears from the report, went on the authority of *Weedon v. Medley*. The weight of authority, therefore, is decidedly against the sufficiency of the affidavit. And it would be very difficult to indict the maker of it for perjury, if the bill had never been presented at all : it is quite consistent with all the allegations that it was never presented either for acceptance or payment, and that the drawee never refused to accept, nor the acceptor to pay it.

BOLLAND, B., concurred.

ALDERSON, B.—In *Buckworth v. Levy*, the terms in which the omission to aver a refusal by the acceptor appeared in the affidavit, are not given in the report ; in truth, therefore, the first reported case actually deciding the point is *Cross v. Morgan*. We certainly did not in-

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tend, in deciding *Weedon v. Medley*, to lay down any different rule; and I adhere to the opinion expressed in *Cross v. Morgan*, and *Banting v. Jadis*.

Rule absolute (a).

(a) See also *Simpson v. Dick*, 3 Dowl. P. C. 731.

JENKINSON v. MORTON.

A defendant is not entitled to enter a suggestion for double costs under the *Middlesex* County Court Act, 23 Geo. 2, c. 33, where the debt is reduced below the sum of 40s. by a set-off.

THIS was an action on a tailor's bill for 17*l.*; the defendant pleaded a set-off. At the trial, before the under-sheriff of *Middlesex*, the defendant established a set-off to the amount of 16*l.* 5*s.*, and the plaintiff accordingly had a verdict for 15*s.*

C. Jones, on a former day in this term, obtained a rule *nisi*, to enter a suggestion on the roll, under the *Middlesex* County Court Act, 23 Geo. 2, c. 33, s. 19, for the purpose of entitling the defendant to double costs.

Humfrey shewed cause.—The provisions of the act, giving costs to the defendant, do not apply to a case where the debt is reduced by set-off. Mr. *Tidd* says, “It is a constant and invariable rule, that none of the court of conscience acts extend to cases where the debt, being originally above the limited amount, is reduced under it by means of a *set-off* or *tender* (a).” In principle, the jury has tried *two* debts, one of 17*l.* due to the plaintiff, another of 16*l.* 5*s.* due to the defendant. In *Pitts v. Carpenter* (b), it was so held upon the *London* Court of Requests Act, 3 Jac. 1, c. 15. The Court there says:—“Though the damages were under 40*s.*, it is plain the

(a) *Tidd*, Pr. 959, (9th edit.).

(b) 2 Str. 1191.

real demand was above 40s.; and how could the plaintiff tell whether the defendant would set-off any thing in that action, so as to be bound to choose that jurisdiction? Besides, he has in effect recovered more, because a debt, which he must otherwise have paid, is now satisfied. Here are two causes determined, both of them of greater value than is within the inferior jurisdiction." In *Jones v. Harris* (a), which was a decision on the statute now in question, and where the costs were allowed, *Taunton, J.*, proceeded altogether on the ground that the demand was not reduced by a set-off, having referred to the Judge who tried the cause to ascertain whether that was the fact or not. [Lord *Abinger, C. B.*—There can be no doubt about the good sense of the distinction; the only question is, whether this act is peremptory or not.] The benefit conferred by sect. 19 is confined to such defendants as are liable to be summoned to the county court. But, by reference to the first section, it appears that its jurisdiction extends only to suits "where the debt or damages shall not amount to the sum of 40s." The defendant in this case, therefore, the subject of the suit being 17*l.*, was clearly not liable to be summoned to the county court in this action. [Lord *Abinger, C. B.*—The plaintiff could not sue in the county court for his debt, but might he not have sued for the balance under 40s., giving the defendant credit for his cross demand?] There is no process by which he could compel the defendant to come into Court, and admit that it was a balanced account. If he sued for the balance only, that would be an abandonment of the rest of his claim, and the defendant might nevertheless refrain from giving any notice of set-off, and bring a cross action for the whole of *his* demand. Moreover, sect. 4 expressly restrains the jurisdiction to such cases as were cognizable by the old county court.—The Court here called on

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(a) 1 Dowl. P. C. 374.

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C. Jones to support the rule.—The words of sect. 19 are express and clear, that, if the jury shall find the *damages* for the plaintiff under the value of 40s., the defendant shall (except in the cases specified) be entitled to double costs. The provisions of ss. 1 and 4 mean only that no action shall be brought in that court for a debt above 40s. But what is the *debt* recoverable by the plaintiff, but the balance after giving the defendant credit for the debt due to him? The plaintiff well knew that the real balance owing to him was less than 40s. [*Parke, B.*—Then you make him abandon the rest of his debt, and then when you come to sue for yours, he cannot set it off; so that he is to leave it in your power to make him lose it altogether.] He may shew that he has given credit for the defendant's debt in the former action. [*Parke, B.*—Not unless the defendant admitted it; there must be two parties to an account stated.] There are several authorities and *dicta* strongly in favour of the defendant. In *M'Collam v. Carr* (a), *Eyre, C. J.*, had expressed an opinion that the act applied only where the original demand was under 40s., and not where it had been reduced by money on account. But, in *Bateman v. Smith* (b), Lord *Ellenborough*, referring to the *dictum* of *Eyre, C. J.*, said, "it was assuming the whole question to say that the original debt was under 40s., for, the jury had found the damages to be under 40s., which entitled the defendant to double costs within the very words of the act." And in *Chadwick v. Bunning* (c), Lord *Tenterden* assents to the opinion of Lord *Ellenborough*, and says it is not possible to put any other construction upon the words of the statute. *Clarke v. Askew* (d), and *Horn v. Hughes* (e), are authorities to the same effect. [Lord *Abinger, C. B.*—Those

(a) 1 Bos. & P. 223.

(b) 14 East, 301.

(c) 5 B. & C. 532.

(d) 8 East, 28.

(e) Ibid. 347.

were cases where the debt was reduced by *payment*, so that at the commencement of the action there was not a debt above 40s. *Parke, B.*—In the case of payment, the act has been already done by the defendant, and has had the effect of reducing the debt; in the case of set-off, it depends on an act *to be* done by the defendant, whether he will avail himself of the statute or not.] Neither Lord *Ellenborough* nor Lord *Tenterden*, in the cases referred to, restricts his observations to a case of payment only; both speak of the verdict of the jury as the only test whether the statute applies or not. It is quite competent for the parties, when they come into Court, to agree that the set-off shall be allowed. It is clear that a defendant is entitled to costs under the 43 *Geo. 3*, c. 46, if the plaintiff arrests him for the whole debt, without giving him credit for a cross demand; the balance only being considered the existing *debt* for the purpose of arrest. [*Parke, B.*—Because the plaintiff has already security for the remainder.]

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LORD ABINGER, C. B.—This appears to me a very clear case. No case whatever has been cited to shew that this act has ever been applied to the case of a set-off; all the authorities referred to were cases, either where there was no original debt above 40s.,—as in *Bateman v. Smith*, where the claim was cut down by the defence of infancy,—or where the debt was reduced below that amount by payments. All these are cases where the defendant might have reduced the debt on the general issue; but, in the case of a set-off, it depends on the defendant's pleasure whether he will avail himself of it on the trial or not; how can the plaintiff tell whether he will do so? Besides, if the act may be made to apply in this manner to claims of much larger amount, as was said by *Eyre, C. J.*, in *M'Collam v. Carr*, the most important and intricate questions of mutual accounts might be made the subject of

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discussion in this inferior court; such as the act never could have intended to submit to its jurisdiction. When the rule was moved for, the 19th section only was presented to our consideration; but, on reference to sect. 1, it appears that a defendant is not liable to be sued at all in the county court, unless the debt is under 40s. Then sect. 19 refers to that provision, and also confines the right to costs to cases in which the defendant could have been sued in the county court.

PARKE, B.—I am of the same opinion. It is clear that the general rule of construction applicable to statutes of this nature is, that they extend to cases where the debt is reduced by payment or other matter amounting to satisfaction, but not to cases of set-off; but it is suggested that the words of the 19th section of this act have made a different rule of construction necessary in the present case. Looking to that section alone, there is certainly good reason to contend that in this case the general rule should not prevail. But when, referring to sect. 1, we see that the plaintiff could not have sued in the county court for this debt, we must read the two sections together, and confine the 19th to cases where not only the defendant is liable to be summoned in that court, but the debt also is one that could be sued for in that court: applying that construction, the case is brought within the range of all the decisions. And the inconveniences of an opposite decision would be so great as in themselves to make it very difficult for us to come to such a conclusion. Here, it is clear the plaintiff could not have sued for the debt in the county court.

BOLLAND, B.—I am of the same opinion. *Horn v. Hughes* is the case which comes nearest to this; but, on looking to the circumstances of it, there is a clear distinction. Lord *Ellenborough* there says, “It appears that

less was due *at the time of bringing the action*, by means of a part payment, of which the plaintiff must have been cognisant." Here, the debt is not in any way reduced at the time of bringing the action, and the plaintiff cannot tell whether it will be reduced at the trial.

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ALDERSON, B.—Before a party can be prejudiced by bringing an action in a superior instead of an inferior court, it must certainly appear that he was compellable to bring it in the inferior court; else you punish a man for not doing that which the law does not oblige him to do. The legislature could never intend so absurd a consequence.

Rule discharged, with costs.

ROLFE and Another v. SWANN.

BUSBY had obtained a rule to set aside the copy of the *capias* issued in this cause, and service thereof, for irregularity, and to deliver up the bail-bond to be cancelled, on the ground that the residence of the defendant was not sufficiently stated in the writ, pursuant to the Uniformity of Process Act. He was described as "*Thomas Swann, a clerk in the Army Pay Office, Somerset House, in the city of Westminster, and county of Middlesex.*" The defendant's affidavit stated that there was no such office in *Somerset House* as the Army Pay Office; that he resided at 25, *Oxford Terrace, Edgeware Road*, and that his place of business had been, for the last thirty-seven years, in the Army Pay Office, *Whitehall*.

"*T. S. a clerk in the Army Pay Office, Somerset House, in the city of Westminster and county of Middlesex:*"—*Held* not to be a sufficient description of the defendant in a *capias*. The blank following the word "of" in the form given by the Uniformity of Process Act, must be filled up with the place of the defendant's actual or supposed residence, or, if the plaintiff have no knowledge of these, with the place

W. H. Watson shewed cause.—With respect to the objection that no sufficient residence is stated, *Hill v.*

where the defendant is or is supposed to be; in conformity with the directions given in sect. 1, as to the writ of summons.

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Harvey (a) is strongly in point against this application. There, the distinction was taken between the case of a summons and that of a *capias*, and the Lord Chief Baron expressed his opinion that the blank in the form given by the statute was, in the latter case, sufficiently filled up by any thing which gives a clear and definite *descriptio personæ* of the party, such as may reasonably enable the sheriff to find and take him; and the decisions there cited of *Taunton, J.*, in *Buffle v. Jackson* (b) and *Welsh v. Langford* (c), in the latter of which that learned Judge held the description "Captain J., of the Hon. *East India* Company's ship K., and now most likely to be found at the *East India House, London*," to be sufficient, are even stronger authorities to the same effect. The language of Lord *Tenterden*, C. J., in *Clarke v. Palmer* (d), goes to the effect that the indorsement on the *capias* of the name and place of abode of the defendant is merely directory to the sheriff, and is sufficient, if the attorney indorse such description as he is able to give, in cases where he does not know the party's place of abode and addition. *Roberts v. Wedderburne* (e) is certainly a decision against the sufficiency of this writ, but it is opposed by the authority of Lord *Abinger* and of *Taunton, J.*; and their construction appears more consonant to reason. The sheriff is bound to act on his own responsibility that the party designated in the writ is the party whom he is bound to arrest: if the description is not sufficient, he only is prejudiced. If the word "of" points to a place of residence, *Hill v. Harvey* cannot be supported, for "late of" &c. excludes both the actual and supposed residence: it is, in truth, a denial of the word "of." Here, the party obtains his livelihood, and is sure to be found and identified, at the place described; whereas at his *house* there might be two of the same name, an elder and a younger.

(a) 2 C. M. & R. 307.

(b) 2 Dowl. P. C. 505.

(c) Ibid. 498.

(d) 9 B. & C. 155; 4 M. & R. 141.

(e) 1 Bing. N. C. 4; 4 M. & Scott, 488.

As to the misplacing of the Army Pay Office, that could not mislead the defendant; it is clear there is but one Army Pay Office, which is in *Westminster* and in *Middlesex*.

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Busby, in support of the rule.—This is a matter of form, regulated by a statutable provision, and is to be considered with reference to the statute alone; it cannot be referred to any principle. Now, it is submitted, that, under the provisions of the act of Parliament, a *descriptio personæ* is not sufficient in a *capias*, but that the blank must be filled up with a place of residence, either present or late. The schedule to the Annuity Act, 53 *Geo.* 3, c. 141, when requiring the names of witnesses to be stated in the memorial, gives a similar form; “*E. F.* of —;” and it has been distinctly held that this imported that the place of abode of the witness should be subjoined: *Darwin v. Lincoln* (a), *Smith v. Pritchard* (b). In the latter case it was suggested in argument that this could not be done in the case of a soldier or sailor, or other person who might have no place of residence at the time; but to that *Abbott*, C. J., replies, that these cases might possibly be provided for by the subsequent words of the clause then in discussion, which gave a power of making such alterations in the schedule as the nature and circumstances of the case might reasonably require. But the Uniformity of Process Act has no such provision. *Roberts v. Wedderburne* is a direct and explicit decision that a place of residence must be stated; *Lingredge v. Roe* (c) is to the same effect. *Hill v. Harvey* may be supported without trenching on those cases: there was, at all events, a part compliance with the act by the statement of the late residence of the party. Besides, the defendant here is not even stated to be a

(a) 5 B. & Ald. 444.

(b) *Ibid.* 717.

(c) 1 Bing. N. C. 6.

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clerk *of* the office, but merely *in* it. It is consistent with that statement that he may be a banker's clerk casually in the office at the time. In attachments against the sheriff, the affidavit of service is defective if the service is stated to have been upon a clerk *in* the office; it must be on a clerk *of the sheriff*.

But there is also a clear misdescription in stating the office to be in *Somerset House*. And it is to be observed, that the plaintiff's attorney does not swear that he did not know the defendant's place of private residence.

PARKE, B.—It seems to me that this rule should be made absolute. The act of parliament requires the *capias* to be in a certain form, and the form given describes the defendant as “*C. D. of —*.” I think the word “*of*” *prima facie* means to connect itself with the place of residence of the defendant. But we may call in aid the first section of the act to shew the intent of the legislature in using that word. Now, that section directs that in every writ of summons, and copy thereof, the place and county of the residence, or supposed residence, of the defendant, or wherein he shall be, or shall be supposed to be, shall be mentioned. Any one of those four descriptions is sufficient to satisfy the intent of the legislature. Now, the Court of *Common Pleas*, in two cases, appear to have put the same construction on the words referring to the writ of *capias*; and I feel disposed to abide by that construction. Two other cases have been cited, in which a contrary opinion has been expressed, viz. *Welsh v. Langford* and *Hill v. Harvey*. Both of them, however, may be supported on the principle of construing the description, by reference to the first section, as a description of the place where the party might be supposed to be. Lord *Abinger* certainly appears, in the latter case, to adopt the reasoning of *Taunton, J.*, and to have considered the statute complied with if there was a sufficient *descriptio personæ* to identify

the party. But *Roberts v. Wedderburne* was not there cited; and I own it appears to me a more reasonable construction, that it is not enough to describe the party merely by his property or calling, or any other circumstance sufficient to identify him, but that the *prima facie* object of the statute is to fill up the blank with the place of residence, according to the decision in the *Common Pleas*. *Buffle v. Jackson* (a) decided no more than that, where a place of residence is given, it need not be precisely correct. The only opinions, therefore, at variance with our present decision are those of *Taunton, J.*, and Lord *Abinger*, in *Welsh v. Langford*, and *Hill v. Harvey*; both expressed without their having the advantage of considering the weight due to the case of *Roberts v. Wedderburne*. It seems to me that the statute requires that either the actual or supposed place of residence of the defendant must be stated, or some place in which he may be supposed to be. Here there is no such description; he is not said to be of the Army Pay Office; there is only a description of his person, and none of any place either of his abode or where he may be supposed likely to be found. If we deviate so far from the terms of the statute as to hold this writ sufficient, where are we to stop? I regret that we did not come to the conclusion of allowing amendments of matters of form in writs: the majority of the Judges, however, decided otherwise, and by that decision we must be bound. If we were disposed, which I am not, to adopt the system of equivalents, I am by no means sure that this is in fact an equivalent.

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BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion. The safest way to proceed, in filling up the blank, is, by referring to

(a) 2 Dowl. P. C. 505.

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the first section; that is, to fill it up with the place of actual residence, if you know it; if not, with the place of the supposed residence; if neither of these be known, then with the place where the party is, or is supposed to be. If the attorney is utterly without knowledge where the defendant resides, why not fill up the blank with the place "of" where he supposes him to be. Of course he must do this at his peril; because if it appears that he could give a better description, he is bound to do so.

PARKE, B.—He need not give a residence within the particular *county* of the sheriff; therefore there is no difficulty on that score.

Rule absolute.

KIRTON v. BRAITHWAITE.

The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the *Wednesday* following, at 12 o'clock, proceedings would be commenced. On the *Wednesday*, at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge for the letter were also paid. It appeared that the writ was issued at 11 o'clock on that day:—*Held*, (Parke, B., *dubitante*), that this was a good tender.

DEBT for goods sold and delivered, work and labour, and on an account stated. Pleas, first, *nunquam indebitatus*; secondly, as to 3*l.* 6*s.* 9*d.*, parcel &c., a tender; and issue thereon. At the trial before the under-sheriff of *Middlesex*, it appeared that the action was brought to recover the sum of 3*l.* 6*s.* 9*d.*, being the balance of an account for goods supplied and work done by the plaintiff, a stationer, for the defendant, from 1829 to 1835. The following evidence was given for the defendant, to prove the tender of that sum.

On the 8th of *February*, 1836, the plaintiff's attorney, Mr. *Elkins*, wrote the following letter to the defendant on the part of the plaintiff:

" Sir,

" I am instructed by my client, Mr. *James Kirton*, of

Portland Street, Cavendish Square, to apply to you for payment of the sum of *3l. 6s. 9d.* due from you to him; and I have to inform you, that unless the same, together with my charge, as under, is paid at my office by *Wednesday* next, at *12 o'clock*, proceedings will be commenced against you for the recovery thereof without further delay.

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Debt . £3 6s. 9d.

“ I am, &c.

Charge 0 6 8

“ *W. M. Elkins.*”

£3 13s. 5d.

“ *Mr. Frederick Braithwaite.*”

The defendant's clerk stated, that on the *Wednesday* morning, before ten o'clock, he went by the defendant's directions to the office of Mr. *Elkins*, and saw there a servant, who, on his inquiring for Mr. *Elkins*, said, neither he nor the clerk was yet come. He waited till a few minutes past ten, when one of the clerks (a boy) came in. The witness told him he had come to tender the amount of Mr. *Kirton's* claim against Mr. *Braithwaite*: and put *3l. 6s. 9d.* on the table, saying he had received orders to tender that amount. The boy refused to take it, unless the costs of the application to the defendant were also paid, and said the full amount was *3l. 13s. 5d.* The defendant's clerk thereupon, after again tendering the *3l. 6s. 9d.*, which was again refused, went away. Mr. *Elkins* had not then come.—On the other hand, the boy to whom the tender was alleged to have been made, stated, that having referred to the letter book, he refused to take less than *3l. 13s. 5d.*; and that the person who came on the defendant's part said he was willing to pay the debt, but would not pay for the letter, and put his hand into his waistcoat pocket, but did not bring it out, or tender the witness any money. The witness desired him to call again at twelve, but he did not. It appeared that the writ was issued that day at eleven o'clock. The under-sheriff told

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the jury, that if they believed the money was produced, he thought this was a good tender: and the jury found for the defendant.

Knowles obtained a rule *nisi* for a new trial, on the ground of misdirection, the tender to the clerk of the plaintiff's attorney not being a good tender: *Bingham v. Allport* (a).

Humfrey shewed cause, and contended that this was a sufficient tender. The plaintiff's attorney, having authorized the defendant to pay the debt at his office, was bound to have a proper person there to receive it, and whoever might be there was constituted his agent for that purpose; and he had no right whatever to demand payment of more than the debt. This was manifestly a mere trap for the purpose of inducing a tender after the writ had issued. He cited *Barrett v. Deere* (b).

Knowles, contra.—The question was, whether the party to whom the tender was made had authority to receive, at that time, the specific sum tendered; if he had not, this tender was clearly insufficient: *Goodland v. Bleweth* (c). Now, the only authority to pay the money at the office was given by the letter; and that only authorized the receipt of the sum of 3*l.* 13*s.* 5*d.*, at the hour of twelve. Here the party came at an earlier hour, and tendered a smaller sum. *Barrett v. Deere* was a case of *payment*; but payment and tender stand on a different footing, and stricter proof is required of the authority in the latter case than in the former.

LORD ABINGER, C. B.—I agree that without the letter

(a) 1 Nev. & M. 398.

(b) 1 Nev. & M. 200.

(c) 1 Campb. 477.

there was no authority to make the tender to this clerk: but the letter, which authorizes the payment of the debt at the attorney's office, together with his charge for the application, (which he had no right to exact), conveyed an implied authority that somebody should be there to receive what was justly due. I do not see, therefore, what objection can be made to the tender, after the authority given by this letter.

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PARKE, B.—I own I entertain some doubt in this case. There can be no doubt, that to make a tender good, it must be made either to the plaintiff himself, or to an agent authorized to give a receipt for the debt. Here we must assume that the boy had no previous authority to receive the money; without the letter, therefore, the tender would be bad, because not made to an agent duly authorized. But the letter imports that some person will be at the office, who will have authority, whoever he may be, to receive the money, if the payment is made there. My doubt is, whether it authorized such person to receive a less sum than 3*l.* 13*s.* 5*d.* True, the attorney had no right to annex the condition, that his charge should be also paid; but he might give a special authority to receive a particular sum only; and if so, a tender of a less sum was not within that authority. I have therefore some doubt on the case; but as the rest of the Court are of a different opinion, the rule will be discharged: and this was certainly a very improper attempt on the part of the plaintiff's attorney to get the costs of a writ.

BOLLAND, B.—I think this was a good tender. There is no doubt the letter would authorize any body in the office to receive the money: the only question is, whether, as more was demanded, it was a good tender of the smaller sum, which alone was really due; and I think, under all the circumstances, that it was.

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GURNEY, B.—This tender would certainly not have been good but for the letter; but having written that letter, the attorney was bound, either to attend himself, or to leave a clerk to receive it. The tender is made to a clerk in that office, and before twelve o'clock; and I think that tender was good.

Rule discharged (a).

(a) See *Wilmott v. Smith*, M. & M. 238; 3 C. & P. 453.

HOUGH v. BOND.

If a plaintiff treats a plea as a nullity, and signs judgment as for want of a plea, he so treats it for all purposes, and cannot afterwards say that it was merely irregular, so as to be a waiver of the demand of a plea.

PETERSDORFF had obtained a rule *nisi* for setting aside the judgment signed in this cause for irregularity. It appeared that a plea was delivered on the 19th of *April*, which was dated of the 20th; the plaintiff's attorney treated this plea as a nullity, and, on the 20th, signed judgment as for want of a plea. There had been no demand of a plea.

Curwood shewed cause.—The plaintiff was justified in treating this plea as a nullity. The rule of *Hilary Term*, 4 *Will.* 4, (General rules and regulations, s. 1), expressly directs that every pleading shall be intitled of the day when it was pleaded, and shall bear no other time or date. The only way to enforce obedience to the rule is to inflict the penalty at once. Before the new rules, there were decisions both ways on this point; but the rule is peremptory, and this judgment was therefore regular. It is objected, however, that there was no demand of a plea. But if a plea is in fact pleaded, though irregularly, that is a waiver of the demand of a plea: *Lockhart v. Mackreth* (a), *Perry v. Fisher* (b), *Bond v. Smart* (c).

(a) 5 T. R. 661.

(b) 5 East, 549.

(c) 1 Chit. R. 735.

Petersdorff, in support of the rule.—The plaintiff has no right to treat the plea as a *nullity*, for the purpose of signing judgment as for want of a plea, and then to say it is only irregular, in order to set up a point of waiver. It is not disputed that the delivery of a plea that was merely irregular would be a waiver; but here it is the same as if no plea at all had been delivered. In *Dakins v. Wagner* (a), where the plea delivered was bad because it had *no* date, it was held that the plaintiff had no right to sign judgment till the time for pleading was out, because within that time the defendant might deliver an amended plea. [*Parke, B.*—*Perry v. Fisher* appears to be an authority against you, because there the plea was a *nullity*, yet the Court held that it was a waiver of the demand of plea.] It does not appear whether the time for pleading was out in that case or not. [*Parke, B.*—*Macher v. Billing* (b), in this Court, is in support of your argument.]

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PARKE, B.—The Court are of opinion that the decision in *Macher v. Billing* in principle governs the present case; and that if a plea be treated as a nullity, it is so treated for all purposes. If so, it is the same thing as if no plea at all had been pleaded; then the plaintiff cannot sign judgment without a demand of a plea.

The other Barons concurred.

Rule absolute.

(a) 3 Dowl. P. C. 535.

(b) 1 C. M. & R. 577.

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PARTRIDGE *v.* WALLBANK.

In an action of debt on bond, and for money paid, the Court refused to amend the writ of summons, which had been sued out on promises instead of in debt, in order to save the Statute of Limitations; inasmuch as the remedy on the bond would remain, notwithstanding the expiration of the six years.

THIS was an action of debt on bond, and for money paid. The writ of summons had been sued out on promises instead of in debt.

Chandless moved for a rule to amend the writ, in order to save the Statute of Limitations; and cited *Horton v. Inhabitants of Stamford* (a), to show that the Court would allow an amendment of the writ for that purpose.

PARKE, B.—There the whole cause of action would have been out of time but for the amendment; but here you may still go upon the bond though the six years have elapsed; therefore your action is not entirely barred by the statute if the motion is not granted.

Rule refused.

(a) 1 C. & M. 773.

VERNON *v.* TURLEY (a).

Declaring *de bene esse* in the original action is no waiver of

ARCHBOLD had obtained a rule *nisi* for setting aside the proceedings on the bail-bond given in this cause, on

previous proceedings in an action on the bail-bond.

The plaintiff signed an agreement with an agent of the defendant, on the 29th of *September*, that on the defendant's entering into an agreement to pay the debt, part in iron within a month, and the remainder by bill at two months, the action should be discontinued; and the defendant was to call on the plaintiff on the following day, to enter into the agreement. He never did so call. On the 8th of *October* the plaintiff gave notice to the defendant that he held himself disengaged from the agreement, and should proceed with the action forthwith. On the 20th of *October*, the defendant delivered to the plaintiff, and the latter received, two bills of exchange for the greater portion of the debt. He did not deliver any iron, and became bankrupt on the 6th of *November*:—*Held*, that there was not a giving of time to the defendant, so as to discharge the bail.

Bail applying to be discharged from liability on the ground of an agreement for giving time to the principal, must come in the term next after they know of the agreement.

(a) This case was decided in Hilary term. See *Vernon v. Hodgins*, ante, p. 151.

two grounds:—*first*, that time had been given to the defendant, without the concurrence of or communication to the bail; and *secondly*, that the proceedings were irregular by reason of the plaintiff having declared *de bene esse* in the original action against the defendant after suing out process against the bail, and having subsequently declared in the action against the bail without issuing a fresh writ.

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The defendant was arrested on the 24th of *September*; the assignment of the bail-bond was taken on the 11th of *November*; on the 14th a writ of summons issued against the defendant and the bail jointly; on the 18th the plaintiff declared *de bene esse* in the original action; on the 29th he declared, as assignee of the bail-bond, against one of the bail, *Hodgins*, alone. The affidavit of *Hodgins*, in support of the present rule, stated that several days before the time for putting in special bail had expired, he inquired of the defendant and his attorney whether the action was settled, or whether there was any danger of his being put to any loss or expense in consequence of his having become bail; and was assured by them that there was no such danger, as the defendant had arranged the action on certain terms with the plaintiff; and that his belief of such arrangement was the sole cause why he did not proceed to justify bail or render the defendant. The affidavit of the defendant *Turley* further stated, that on the 29th of *September* a written agreement was entered into between him and the plaintiff, that the present action, and another which had been commenced by the plaintiff against one *Caddick*, should be discontinued, and a bill for 260*l.*, drawn by the defendant and accepted by *Caddick*, should be destroyed, on the defendant *Turley* entering into an agreement to pay the plaintiff the balance of his account, part in iron within a month, and the remainder in an acceptance at two months: if the defendant should not fulfil his agreement, the action against him was to be proceeded with:—and the defendant

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swore, that, in pursuance of the agreement, he gave the plaintiff, on the 20th *October*, two bills of exchange for 215*l.*, for which credit was given him by the plaintiff, and that it was his intention to have delivered the iron, if he had not been prevented by a fiat in bankruptcy being issued against him. The affidavits of the plaintiff and his attorney, on the other hand, stated that the agreement was signed by the plaintiff on the proposal and importunity of *Richard Turley*, the defendant's brother, who agreed that the defendant should attend on the following day to enter into the agreement, but he did not so attend; that the plaintiff made several ineffectual applications for the delivery of the iron; that the fiat did not issue against the defendant until the 6th *November*; and that, in consequence of the non-performance of the agreement, the plaintiff, on the 8th of *October*, gave the defendant and *Caddick* a written notice that he considered himself disengaged from the agreement, and should proceed immediately with both actions.

Erle and *Whitmore* shewed cause.—As to the first objection, it is clear that this was a mere conditional agreement, which, not being performed by the defendant, became inoperative altogether, and left the parties in the same position as before. And the receipt of the bills, which were valueless, could not be considered as binding the plaintiff to any agreement which precluded him from proceeding with the action, after he had given an express notice that he should proceed with it, and that he held himself disengaged from the agreement. It was held, in *Ladbroke v. Hewett* (a), that a mere *honorary* obligation on the part of a plaintiff not to press a defendant for payment of the debt, was not such an indulgence to him as would discharge the bail. At all events, the bail had notice of the agreement in time to have applied in *Michaelmas* term.—As to the alleged irregularity, *Collet v. Bland* (b) is an authority to shew that any-

(a) 1 Dowl. P. C. 488.

(b) 4 Taunt. 715.

thing done in the original cause, after the action on the bail-bond has been commenced, has no effect on the proceedings in such action.

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Archbold, contra.—These proceedings were irregular. By declaring *de bene esse* in the original action, the plaintiff waived the process in the action on the bail-bond, and could not go on to declare in that action without issuing new process. [*Parke, B.*—The plaintiff declares in the original action only in order that when the defendant comes to set aside the proceedings on the bail-bond, he may be able to contend that he has lost a trial. It is only a conditional proceeding.] The proceedings on the bail-bond assume that the proceedings in the original cause are at an end by reason of the defendant's not having come in. [*Parke, B.*—If he had declared in chief, no doubt that would have been a waiver.] He could not declare in chief at all until the bail had justified; the question, therefore, never could arise on a declaration in chief. But it has always been the understanding of the profession, that, after proceeding against the bail, the plaintiff could not take any step in the original action, without thereby waiving the proceedings against the bail.

But in the next place, time was given to the defendant, so as to exonerate the bail. The plaintiff obtained an additional security by the receipt of the bills; that was a sufficient consideration for a stay of proceedings: and it does not appear that he has ever re-delivered them. Their being taken after the notice given by the plaintiff that he should proceed, makes the case stronger against him. The defendant performed the agreement so far as lay in his power; for he swears that his bankruptcy was the only cause of his not delivering the iron. In *Willison v. Whitaker* (a), bail were held to be discharged by the plaintiff taking from the defendant bills of exchange, to which a surety was party, for payment by instalments, although

(a) 7 Taunt. 53.

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they proved of no value. [*Parke, B.*—That was a single insulated transaction, of giving bills in satisfaction of the debt, and had the effect of suspending the action until they became due and were dishonoured; can we say, looking at the whole transaction, that such was the intention of the parties here? But suppose it was so, why did you not apply during the whole of *Michaelmas Term*?] Bail are discharged by time given to the principal without their consent, although they may not have been damaged at all: *Hannington v. Beare (a)*.

LORD ABINGER, C. B.—On the first point, the only question is whether time was in fact given. The agreement is clearly a conditional agreement on the face of it; the defendant was himself to do something in fulfilment of it, which he never did; the plaintiff, therefore, was no longer bound by it; and of that he gave the defendant notice. Then, with respect to the receipt of the bills, the only question is, whether that formed a new agreement; it is clear that it did not complete the original agreement. Even if it was a new agreement, the bail ought to have applied in *Michaelmas Term*; but I think it clearly was not. It is quite consistent that the bills were taken on the understanding that the defendant would afterwards fulfil the rest of the agreement. As to the other point, a conditional proceeding, such as is the declaring *de bene esse*, is no proceeding at all, so as to amount to a waiver.

PARKE, B.—I am clearly of opinion that it has not been made out that these bills were given as a new agreement for the payment of the debt: and if it had, I quite agree that the bail ought to have applied in *Michaelmas Term*.

The other Barons concurred.

Rule discharged with costs.

(a) 4 Dowl. P. C. 256.

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REX v. POWELL, Clerk, (in a Cause of ION v. POWELL).

CHANNEL moved for a writ of sequestration, on a return to a special writ of *capias utlagatum* which had issued against the defendant. The sheriff had returned that the defendant had no goods nor any lay fee within his bailiwick, but that he was a beneficed clergyman: it did not, however, state the name of the benefice, or where it was situate; but those particulars were supplied by affidavit. In *Rex v. Armstrong (a)*, where the return was that the defendant had no goods nor any lay fee within the bailiwick, but was possessed of the rectory of —, the Court granted the sequestration. The return there was certainly somewhat more formal than in the present case, but the defect was supplied here, if the affidavit could be called in aid. [*Parke, B.*—Should there not be some *record* shewing to what bishop the writ is to be directed? *Lord Abinger, C. B.*—Can we amend the return by an affidavit, so as to fix a particular bishop?] The writ cannot prejudice any party: if the sequestration takes priority of other creditors, they can move to set it aside, if wrongly issued.

To a writ of *capias utlagatum*, the sheriff returned that the defendant had no goods, nor any lay fee within his bailiwick, but that he was a beneficed clergyman; not stating the name or situation of the benefice. The Court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return.

LORD ABINGER, C. B.—We ought not to impose that expense upon them. The best course would be to apply for a rule to shew cause why the sheriff should not amend his return.

PARKE, B.—The proper form of the return is given in *Tidd's Forms*, p. 420, (6th edit.)

Channel intimated his intention of making such application to the Court of *King's Bench*, in which the cause was.

Motion refused.

(a) 2 C. M. & R. 205.

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DOE *d.* HUMPHREYS *v.* OWEN.

In discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking, the Court will order payment of costs of the day, "if any," although the defendant's affidavit do not shew that any costs have been incurred.

But not where his affidavit shews that none could have been incurred; as where it states that notice of trial was duly countermanded.

RULE for judgment as in case of a nonsuit. A peremptory undertaking was accepted, but the plaintiff sought to have an order for costs of the day, "if any," as part of the rule.

Welsby, who shewed cause, objected to this, on the ground that the defendant's affidavit did not shew that any costs had been incurred, and referred to *Ray v. Sharp (a)*, as an authority that that was necessary to be stated.

PARKE, B.—You cannot be prejudiced by a provision for payment of the costs, *if any*; if none have been incurred, you will have none to pay.

The rule was drawn up accordingly.

J. Jervis in support of the rule.

The same point was ruled in a case of *Thomas v. Hutchinson*, in *Trinity Term*, in which *Ray v. Sharp* was again cited for the plaintiff.

But in another case in the same term, *Tarbuck v. Bisphan*, where it appeared on the face of the defendant's own affidavit, that notice of trial, which had been given for the assizes, had been countermanded in due time, the Court, in discharging the rule for judgment as in case of a nonsuit on a peremptory undertaking, refused to make an order for payment of costs of the day, if any; *Parke*, B., saying that to do so would be to invite further inquiry, which ought not to be invited, where it appeared from the defendant's own affidavit that no costs could have been incurred.

(a) 4 Dowl. P. C. 354.

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HARRIET REEVES, Executrix of WILLIAM REEVES,
deceased, v. HEARNE.

THE two first counts of the declaration were *indebitatus assumpsit* in 15*l.* for goods sold and delivered by the plaintiff's testator to the defendant, and on an account stated between them; stating a promise by the defendant to the testator in his lifetime, and a breach in non-payment to the testator, or to the plaintiff, executrix as aforesaid. The third count was as follows:—And whereas also after the death of the said *William Reeves*, to wit, on the 1st day of *October*, 1832, the defendant was indebted to the plaintiff, as executrix as aforesaid, in 11*l.* 5*s.* 6*d.* for goods sold and delivered by the said *William Reeves* in his lifetime to the defendant at his request, and the last-mentioned sum being due and in arrear, heretofore, to wit, on the day and year last aforesaid, in consideration thereof, and that the plaintiff, as executrix as aforesaid, at the defendant's request, had agreed with him to accept a certain suit of clothes, to be made and provided by the defendant for one *John Richmond*, the plaintiff's servant and traveller, in part discharge and satisfaction of the said debt of 11*l.* 5*s.* 6*d.*, to wit, to the extent of the price and value of such suit of clothes (the said plaintiff then and from thence hitherto and still being indebted to the said *J. Richmond* in a large sum of money, to wit, the sum of 50*l.*, for wages then due and owing to the said *J. R.*, as such clerk and traveller as aforesaid, and the said *J. R.* having then agreed to receive, and having

A declaration by an executrix stated, that, after the death of the testator, to wit, on the 1st of *October*, 1832, the defendant was indebted to the plaintiff, as executrix, in 11*l.* for goods sold and delivered by the testator in his lifetime to the defendant, and in consideration thereof, and that plaintiff, as executrix, had agreed with the defendant to accept a suit of clothes, to be made by him for *J. R.*, the plaintiff's servant, in part discharge of the debt, (the plaintiff being indebted to *J. R.* in a greater amount for wages, and *J. R.* having agreed and being willing to receive the clothes in part payment), and had also agreed to forbear and give the defendant a reasonable time

for the payment of the remainder of the debt, the defendant undertook and promised the plaintiff, as executrix, to make and provide the said suit of clothes for *J. R.* within a reasonable time, and to pay her the remainder of the debt after a reasonable time for such forbearance. The declaration then averred, that though a reasonable time had elapsed, &c., the defendant had not made or provided the clothes, or paid the residue of the debt. *Plea*, that the debt, in consideration of which the said promise was made, did not, nor did any part thereof, accrue to the testator within six years next before the commencement of the suit, and that such promise was by words only. On special demurrer:—*Held*, that the agreement stated in the declaration was only an agreement for an accord, and did not extinguish the original debt, which, therefore, was barred by the Statute of Limitations.

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from thence hitherto been willing, and still being willing, to receive the said suit of clothes in part payment and discharge of the said sum of 50*l.*, to the extent of the price and value of such suit of clothes); and also in consideration that the plaintiff, as executrix as aforesaid, at the defendant's request, had agreed and promised him to forbear and give him a reasonable time for the payment of the remainder of the said debt of 11*l.* 5*s.* 6*d.*, he the defendant undertook and then promised the plaintiff, as executrix as aforesaid, to make and provide the said suit of clothes for the said *J. R.* upon the terms aforesaid, within a reasonable time then following, and to pay her the remainder of the said debt of 11*l.* 5*s.* 6*d.* at the expiration of a reasonable time for such forbearance: and the plaintiff, executrix as aforesaid, avers that she, confiding in the defendant's last-mentioned promise, hath always been ready and willing to accept such suit of clothes in such part satisfaction and discharge as aforesaid, and the plaintiff did forbear and give time for the payment of the said debt of 11*l.* 5*s.* 6*d.* for a reasonable time from the making of the said agreement with the defendant; and the time for making and providing the said suit of clothes, and paying the remainder of the said debt of 11*l.* 5*s.* 6*d.* upon the terms aforesaid, have elapsed: of all which promises the defendant, on &c. had notice, and was then requested by the plaintiff, as executrix as aforesaid, to make and provide the said suit of clothes, and pay the remainder of the said last-mentioned debt, upon the terms aforesaid. Yet the defendant hath not made or provided the said suit of clothes, or any part thereof, or paid any part of the said last-mentioned debt, in the manner or upon the terms aforesaid, or otherwise, &c.

The defendant pleaded, *first, non assumpsit; secondly,* as to the promise to the testator, that the defendant did not make such promise at any time within six years next

before the commencement of the suit; *thirdly*, as to the promise to the plaintiff as executrix, to make the suit of clothes as in the declaration mentioned, and to pay the remainder of the debt of 11*l.* 5*s.* 6*d.* as therein mentioned, that the debt in consideration of which the said promise was made did not, nor did any part thereof, accrue to the said *W. Reeves* within six years next before the commencement of the suit, and that the said promise was by words only, and was not nor is made or contained in any writing signed by the defendant according to the form of the statute, &c.

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Special demurrer to the last plea, assigning for causes, that the count to which it is pleaded is founded upon a cause of action accruing to the plaintiff as executrix as aforesaid, upon and for the non-performance of a contract made with her as such executrix, upon a new and sufficient consideration, to which the said *W. Reeves* was a stranger; nevertheless the defendant hath not pleaded or shewn that such cause of action did not accrue to the plaintiff as executrix as aforesaid, or that his promise to her as such executrix was not made, within six years next before the commencement of this suit; and it is no answer or defence that the original debt to the said *W. Reeves* did not accrue to him within six years next before the commencement of this suit; and also that it is not shewn in the plea, that the said debt or sum wherein, in the said count it is alleged, the defendant was indebted to the plaintiff, as executrix as aforesaid, for goods sold and delivered by the said *W. Reeves* to the defendant, or the cause of action in respect thereof, did not accrue to the plaintiff, as executrix as aforesaid, within six years next before the commencement of the suit; and it is merely alleged that such debt did not accrue to the said *W. Reeves* within that time; and it is perfectly consistent with the last-mentioned plea and the declaration, that the said *W. Reeves* may have died before any cause of action

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accrued to him in respect of his sale and delivery of the last-mentioned goods to the defendant, or that he may have died before the expiration of six years next after the accruing of such last-mentioned debt, or the cause of action thereon may have accrued to the plaintiff, executrix as aforesaid, within six years next before the commencement of this suit; and that the time for the plaintiff suing as executrix as aforesaid for the recovery of such last-mentioned debt had not elapsed when this action was commenced.

N. R. Clarke, in support of the demurrer.—This plea cannot be supported. The plaintiff declares in the count to which it is pleaded, not upon the original, but upon a new cause of action altogether. The promise to the executrix was not barred by the Statute of Limitations; *Smith v. Forty* (a); and the plea ought to have been pleaded to that promise. [The Court desired him to consider whether the count could be supported.] The plaintiff has a right to join this count with the counts which lay the promises to the executrix: *Cowell v. Watts* (b). She could not sue upon the old debt, because that was superseded by the agreement. She may have been guilty of a *devastavit* by entering into such an agreement, but the debt is extinguished by it. [*Parke, B.*—Is it any thing more than that the defendant, by way of accord for an antecedent debt, agrees to supply clothes to *Richmond*? If he does not supply them, the original debt survives. In *Lynn v. Bruce* (c), where the plaintiff declared on an agreement to accept from the defendant a composition on a debt, in full satisfaction and discharge of the debt, it was clearly held that such a mere accord gave no new ground of action.] Here the time of payment is changed; that shows that it was not merely an accord, but a new contract. The clothes are

(a) 4 Carr. & P. 126.

(b) 6 East, 405.

(c) 2 H. Bl. 317.

to be supplied within a *reasonable time*; that must mean *some* time beyond immediately; and what was a reasonable time would be a question for the jury.

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LORD ABINGER, C. B.—Suppose the Statute of Limitations out of the question, which is the way to try the case; then it is an agreement to pay part of the debt by the supplying of a suit of clothes, part in cash. If the defendant does not so pay, how is the original debt extinguished? There is no new consideration. As to the time of payment, a reasonable time to pay a debt which has been due for some years is to-morrow.

PARKE, B.—On this declaration, *Richmond* being no party to the agreement, it appears to be no more than an agreement for an accord in equity; it is not stated that the defendant went on and partly made the clothes. Even if you could make *Richmond* a party, so as to give him a right to sue for the clothes, it is only satisfaction *pro tanto*, and the original debt remained for the residue; and not being extinguished, it is barred by the statute. It is an ingenious attempt to get rid of the Statute of Limitations, but I see nothing which could have prevented the plaintiff from suing on the original cause of action.

The other Judges concurred.

Judgment for the defendant.

Mansel appeared to argue for the defendant.

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REGIL v. GREEN.

Debt for money lent and money paid. The plea first alleged, that the sums so lent and paid were lent for the purpose of paying, and were paid, to *J. R.*, the master of a ship then in a foreign port, for the repairs of such ship, and not on the security or liability of the defendant; and then went on to state an agreement made in such foreign port, between the plaintiff and *J. R.*, for the defendant, for bottomry, and a bottomry-bond given by *J. R.* to the plaintiff, in pursuance of such agreement; by means of which it was alleged that the plaintiff desired to obtain exorbitant interest for his advances. The replication alleged, *first*, that the money was lent and paid on the security and liability of the defendant; *secondly*, that there was no such agreement, and, *thirdly*, that there was no such bond as was stated in the plea:—*Held*, on special demurrer, that the replication was bad, for tendering issues on several matters, having by the first allegation, put in issue the whole substantial matter of defence.

DEBT, in the sum of 500*l.*, for money lent, money paid, and on an account stated.—Pleas, *first*, *nunquam indebitatus*: *secondly*, as to the said sums of money lent and money paid, that they were so lent for the purpose of paying, and so paid respectively, to *J. R.*, the master of the said ship, for the repairs of a certain ship or vessel, called the *Wilberforce*, then being in parts beyond the seas, to wit, at *Laguna* in *Mexico*, in *South America*, and out of the dominions of our lord the King, on and in the progress of a certain voyage from *Liverpool* to certain parts beyond the seas, to wit, to *Sisal*, *Campeachy*, and *Laguna* aforesaid, and from thence to her port of discharge at *Liverpool* or *London*. And the defendant further saith, that the said several sums of money were not, nor was any part thereof, lent or paid, or the debt in respect thereof contracted, or any part thereof, upon the security or liability of the defendant; but the plaintiff having then refused to accept in payment of the said sums, bills of exchange on the several owners of the said ship, and the said *J. R.* then being master of the said ship, and having no funds or credit of his own in *Mexico* aforesaid, and the plaintiff being anxious to obtain large and exorbitant bottomry interest in that behalf, to wit, on the 1st *December*, 1833, a certain agreement was made between the plaintiff and the said *J. R.*, so being master as aforesaid, for the said defendant, whereby it was agreed that the said *J. R.*, so being master as aforesaid, should give to the plaintiff and one *N. C.*, then being the agent of and in trust for the plaintiff, a certain instrument of bond and hypothecation, and bill of maritime risk and bottomry,

whereby, in consideration of the said sums so lent and advanced, and so paid respectively, the said *British* ship, freight, and cargo, were to be responsible for the said sums so lent and advanced, and so paid as aforesaid, and principal and additional premium of risk and sea exchange, amounting in the whole to a large sum of money, to wit, the sum of 500*l.*, payable under the terms and conditions as hereinafter mentioned. [The plea then set forth a bottomry bond given by *J. R.* to the plaintiff and *N. C.*, in conformity with the agreement.] Verification.

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Replication to the second plea, that the several sums therein mentioned were respectively by the plaintiff lent and advanced, and paid, as in the declaration mentioned, and the said debt in respect thereof was contracted, upon the security and liability of the defendant; and that the said supposed agreement between the plaintiff and the said *J. R.*, so being master as aforesaid, for the defendant, was not made as in the said plea alleged; and that the said supposed instrument of bond, &c., was not made as in the said plea alleged.—Concluding to the country.

Special demurrer, assigning for causes, that the replication is double, in this, to wit, that it is therein alleged that the several sums in the second plea mentioned were lent, advanced, and paid, and the debt in respect thereof contracted, upon the security and liability of the defendant; and secondly, that the agreement was not made as in the plea mentioned; and thirdly, that the bond, &c. was not made as in the plea mentioned; and thereby the plaintiff puts in issue several points, matters, and things, and attempts vexatiously to compel the defendant to proceed to the defence of several things, more than by law he is entitled to do.

Wightman, in support of the demurrer.—[*Parke*, B.—Does not your plea amount to a double general issue?]
The plea may perhaps be bad, but only on special de-

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murrer. But the replication is bad as being double, and putting in issue several distinct and unconnected facts. [Lord *Abinger*, C. B.—If you put two distinct defences into one plea, has not the plaintiff a right to reply to both?] If the replication had been confined to a denial that the debt was contracted on the security of the defendant, and the plaintiff had succeeded on that issue, that would be in effect a finding that the subsequent transaction was not on the credit of the defendant, but of the captain; all the rest of the replication, therefore, was unnecessary. [*Parke*, B.—Supposing the money was advanced on the credit of the defendant, and afterwards there was the agreement for the bottomry bond, that would extinguish the original contract, and transfer the remedy to the ship; therefore, these are two distinct defences.] The replication contains two allegations, either of which is sufficient to defeat the plea. If the first of them, *viz.*, that the money was advanced on the security of the defendant, be found for him, the bottomry transaction does not affect him at all; if it be found for the plaintiff, the bottomry transaction may be called in aid to shew that it was used as the means of obtaining more than 5*l. per cent.* interest, and that may afford another ground of defence. The two allegations in the plea may well be incorporated in it; but the plaintiff has not therefore a right to deny both these consecutive and material allegations. This is not a case to which the replication *de injuriâ* would apply; the plea does not set up matter of excuse, but denies certain of the facts alleged, and then assigns other reasons why the plaintiff should not recover. [*Parke*, B.—What replication would have put in issue the whole defence in the plea? If he had replied only that there was no bottomry bond, you would have said he had not traversed the agreement, or that the money was advanced on the defendant's credit, and therefore that these were admitted.] If he had replied only that the money was advanced on the personal credit of the

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defendant, that would have been an answer, because the plaintiff goes only for money lent, &c.; therefore the transactions between the defendant and the captain would be immaterial, if that issue were found for the plaintiff. [*Parke, B.*—Then you must say all the plea is surplusage except the first averment.] Not entirely so; there might still have been an *argument* on the effect of the bottomry bond, if it were given by collusion between the plaintiff and the captain. But the plaintiff ought to have known that the single traverse on that first averment would decide the whole case, and not therefore to have followed the defendant through the several allegations of the plea, which were immaterial to the issue of the cause.

W. H. Watson, contra.—All the latter portion of the plea is, in fact, wholly immaterial. To relieve the owner of responsibility for money advanced for the use of the ship, it must be an advance on an hypothecation bond, made at the time the bond is given: *The Augustin* (a). The plea, therefore, first states what amounts to a perfect defence, and then introduces matter altogether immaterial, as not shewing anything which removes the previous responsibility of the defendant, if it existed at all. The substantial matter of the plea, then, being traversed, the rest of the replication at most is only *surplusage*, and the demurrer cannot be sustained for *duplicity*. *Mr. Stephen*, in his *Treatise on Pleading* (b), thus states the distinction applicable to this case:—"A plea may be rendered double by matter ill pleaded, but not by immaterial matter Whether a matter be well or ill pleaded, if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over, without taking the formal objection,—such matter tends to the production of a separate issue, and is on that ground held to make the pleading double. On the other hand, if the matter be im-

(a) 1 Dods. Adm. Rep. 283. (b) P. 261, (2nd edit.)

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material, no issue can properly be taken upon it; it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity." [*Parke, B.*—The demurrer does not appear to be confined to duplicity—it objects also, that the plaintiff vexatiously attempts to compel the defendant to proceed to the defence of several things. Supposing all the facts alleged but one are immaterial, is not that properly pointed out?] If they are immaterial, no defence to them is necessary.

Wightman, in reply.—Undoubtedly this objection is formal merely—it stands upon the ground of the inconvenience which arises from violating the rule of pleading relating to duplicity, by putting immaterial matters in issue. The plaintiff has no right to state them as distinct matters of traverse, and so to embarrass the defendant at the trial, and then say it is of no consequence because they are immaterial.

LORD ABINGER, C. B.—I think, strictly speaking, the defendant is entitled to judgment; but the plaintiff certainly ought to have leave to amend.

PARKE, B.—The best course would be to strike out the special plea and replication, and go to trial on the general issue. At present I think the defendant is right: this is not precisely duplicity, but the plaintiff has no right to include several matters in his replication, so as to embarrass the trial: then the objection seems sufficiently pointed out at the end of the demurrer to enable the defendant to take advantage of it.

ALDERSON and GURNEY, Bs., concurred.

Leave to amend.

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ASSUMPSIT in the sum of 2000*l.*, for the work, labour, and attendance of the plaintiff as the attorney and solicitor of the defendant, and for money paid, and on an account stated. Second plea, as to the breach of promise in the declaration mentioned, so far as the same related to the non-payment of the sum of 2000*l.* in the declaration firstly mentioned, except the sum of 90*l.*, parcel thereof, and of the sum of 150*l.* in the first plea mentioned, *actionem non*, because the defendant says, that the said work, labour, and attendance were given, done, and bestowed for and on behalf of the defendant on two several occasions, the former of which occasions was in the year 1832, and the latter in the year 1834, and on each of which occasions he, the defendant, became and was a candidate for the representation in the Commons House of Parliament of certain boroughs called and known by the name of the *Carnarvonshire* boroughs, and the said work and labour, &c., were given, done, and bestowed in and about the endeavouring to secure, and in and about the promoting the return of the defendant as a representative of and member for the said boroughs, and for no other purpose, and on no other occasion whatsoever. And the defendant further saith, that the said work and labour, &c., of the plaintiff, so far as the same related and relates to the first of the said occasions, were done, given, and bestowed by the plaintiff under and by virtue of a certain agreement theretofore, and before the plaintiff had done, given, or bestowed the said work and labour, &c., or any part thereof, or had been or was retained by the defendant for that purpose, to wit, on the 1st of *September*, 1832, made, entered into, and concluded in that behalf by and between the plaintiff and the defendant, which said agreement was and is to the effect following, viz.:—That

Assumpsit for the work and labour of the plaintiff as an attorney. *Plea*, as to all but 90*l.* that the work and labour was performed by the plaintiff in endeavouring to secure the defendant's return to Parliament, on two occasions; under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements; and that no express contract was made between the plaintiff and defendant on the second occasion, and that 90*l.* was a fair remuneration for the plaintiff's services on that occasion:—*Held* bad, on special demurrer, as amounting to the general issue.

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he, the plaintiff, should do, give, and bestow the work and labour, &c., of him, the plaintiff, in and about the endeavouring to secure, and in and about the promoting the return of the defendant, as a representative, &c., on the first of the said occasions, without being or becoming entitled to have or demand from the defendant in respect thereof any fees, money, or remuneration whatsoever; but that he, the plaintiff, should be entitled to have, receive, and demand from the defendant on such occasion, such sums and monies only as he should or might disburse, pay, lay out, or expend, for and on behalf of the defendant, in and about the endeavour to secure, and in and about the promoting the return of the defendant, &c. on the first of the said occasions. And the defendant further saith, that but for the said agreement he the defendant would not have retained or employed the plaintiff to do, perform, and give or bestow his said work and labour, in so far as related to the first of the said occasions, or any part thereof: and that there was not at any time any express contract or agreement made or subsisting by or between the plaintiff and the defendant touching or relating to the scale, rate, or amount of the fees, money, or remuneration to be paid, received, or demanded of or from the defendant, and to be by him payable and paid to the plaintiff for or in respect of the said work and labour, &c., so far as the same related to the last of the said occasions. And the defendant further saith, that the said work and labour, &c., of the plaintiff in the declaration mentioned, were not wholly or in part done, given, or bestowed, in or relating to any suit or suits, or other proceedings whatsoever in any Court of law or equity: and the defendant saith, that a fair, reasonable, and proper remuneration to the plaintiff for and in respect of the said work and labour, &c., so far as the same related to the last of the said occasions, together with all fees due or payable in respect thereof, did not at any time and does not exceed the said sum of 90*l.*, parcel, &c. Verification.

Special demurrer, assigning for cause (~~amongst~~ other things), that the said plea does not either sufficiently confess and avoid, or traverse and deny, that part of the declaration to which it professes to be an answer; and that the defendant does not in or by that plea admit even a colourable right of action in the plaintiff; and that the matter of the said plea amounts only to the general plea of *non assumpsit*, and therefore tends to great and unnecessary prolixity of pleading, &c. &c.

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Cowling, in support of the demurrer.—This plea amounts to the general issue. As to all the demand for work and labour, except 90%, it amounts to an agreement to work for nothing.

The Court here called on

J. Jervis to support the plea.—The plea does sufficiently confess and avoid the declaration; for it confesses work to have been done by the plaintiff for the defendant, but alleges that there was a particular contract relating to the remuneration the plaintiff was to receive. [Lord *Abinger*, C. B.—You rebut the implied promise alleged in the declaration, and state a special contract;—that amounts to *non assumpsit*.] It is questionable whether the agreement could be given in evidence under the general issue, within the terms of the new rule, inasmuch as the defendant admits the matters in fact from which a promise might be implied,—*viz.* the work done. [*Parke*, B.—You do not admit any fact from whence an implied *assumpsit* can arise.] If *Edmunds v. Harris* (a) be law, this agreement ought to be specially pleaded: that case, however, has certainly been questioned both in this Court and the *Common Pleas* (a).

(a) 4 Nev. & Man. 182; 2 Ad. R. 734; *Cousins v. Paddon*, 2 C. M. & Ell. 414. & R. 547; *Alexander v. Gardner*,

(b) *Taylor v. Hilary*, 1 C. M. & 1 Bing. N. C. 671; 1 Scott, 281.

Exch. of Pleas, 1836. If it be not law, undoubtedly this plea cannot be supported.

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LORD ABINGER, C. B.—I think the plea is bad. We held the other day, that, under the general issue, evidence might be given of a special contract to make a machine, with a condition that it should not be paid for if it did not work properly (a).

PARKE, B.—All the statement in this plea is matter of evidence that there was no contract, express or implied. *Edmunds v. Harris* may certainly be considered as overruled.

The other Barons concurred.

Judgment for the plaintiff.

(a) *Grounsell v. Lamb, post.*

KERBEY v. EDWARD DENBY, WILLIAM DENBY, WARREN, and WESTERN.

Trespass for breaking and entering plaintiff's dwelling-house, and assaulting and imprisoning

him, &c. *Pleas*—first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. *Replication*, (admitting the writ and warrant), *de injuriâ absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him:—*Held, first*, that the averment in the plea, that the outer door was open, was a material averment, for that the door's being open was a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore, that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door. *Secondly*, that the defendants having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might (even on the plea of not guilty), give damages in respect of all the injuries complained of in the declaration.

&c., and assaulting and imprisoning the plaintiff. The defendants *Warren* and *Western* pleaded, *first*, not guilty; *secondly*, as to all the trespasses, except the *breaking* of the dwelling-house, a justification under a *capias ad satisfaciendum* directed to the sheriff of *Devon*, and a warrant thereupon, directed by him to them amongst other officers; alleging that by virtue of such writ and warrant they entered the plaintiff's dwelling-house in order to execute the same, the outer-door thereof being at that time open. The defendants *Edward* and *William Denby* pleaded also, by a separate attorney, not guilty; and *William Denby* pleaded alone (as to all the trespasses), as the servant and by the command of *Warren* and *Western*, the bailiffs, a similar justification under the writ and warrant to that pleaded by them. Lastly, *Edward Denby* pleaded alone, as to the assault and imprisonment, that he committed such trespasses as the servant and by the command of the said officers and bailiffs in the preceding plea mentioned, who at the time of the committing of the trespasses were acting under the authority and by virtue of the said warrant, and were then seeking and attempting duly and lawfully to take and arrest the plaintiff in the execution of the said warrant, to wit, by pointing out to the said officers the dwelling-house and place of residence of the plaintiff, and directing and accompanying them thereto; and that he did by the command of the said officers, and as their servant, accompany them to the said dwelling-house of the plaintiff, and direct them thereto, and point out to them the said dwelling-house, &c., as he lawfully might, and so and not otherwise committed the trespasses in the plea mentioned. To the special plea of *Warren* and *Western*, and also to that of *Wm. Denby*, the replication was, that those defendants respectively of their own wrong, and without the cause by them alleged, except so far as the said cause related to the said writ and warrant, and to the said command alleged by *Wm. Denby*, committed the

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trespasses in these pleas respectively justified ; and to the special plea of *Edward Denby*, that he of his own wrong committed the trespasses in that plea mentioned, without this, that he committed them as the servant and by the command of the officers. On these several replications, as well as on the pleas of not guilty, issues were joined.

At the trial before *Littledale, J.*, at the last *Devonshire Assizes*, it appeared, that a writ of *ca. sa.* having issued against the plaintiff at the suit of the defendant *William Denby*, it was put into the hands of the defendants *Warren* and *Western* to be executed ; and late in the evening of the 14th *Dec.* 1835, they came, accompanied by *William* and *Edward Denby*, to the plaintiff's house at *Sidmouth* ; and, having in vain demanded admittance, the outer door, which was locked and bolted, was broken open, an entrance effected, and the plaintiff taken into custody and carried to an inn in the town for the night, and thence, on the following day, to *Exeter* gaol, where he remained for some days, until he gave bail. There was conflicting evidence as to the participation of the two *Denbys* in the breaking open of the door. The learned Judge, in summing up, stated to the jury, that if the justifications were not made out in all particulars, the question in the cause stood upon the general issue only, and they might then give damages for the whole amount of injury sustained, and not merely for the breaking of the outer door. The jury found a general verdict against all the defendants except *William Denby* ; a verdict for him on the plea of not guilty, and against him on his plea of justification ; and gave 20*l.* damages : and the learned Judge gave leave to move to enter a verdict for the defendants *Warren* and *Western*, and for the defendant *Wm. Denby* on the special plea.

Crowder now moved to enter a verdict pursuant to the leave reserved, and also for a new trial, on the ground of misdirection.—It was objected at the trial, and is now sub—

mitted, that on these pleadings the breaking of the outer door could not be made a subject of complaint. Being an *abuse* of the authority given by the writ and warrant, which authority is admitted on the record, it ought to have been replied. [*Parke, B.*—Is it not an essential part of your defence, that the door should be open?] The defendants were only bound to answer the declaration. Now, the *breaking* alleged in the declaration is no more than the mere formal statement of an unauthorized *entering*; and besides, it does not appear on the face of the declaration whether the breaking was of an outer or an inner door; but the defendants would have a right to break open inner doors to execute the warrant. The pleas, therefore, sufficiently answer the declaration by shewing the authority of the writ and warrant. They certainly state that the entry was effected, “the outer door being open;” but that is a mere formal allegation, without which the plea would have been equally good, and the justification equally complete. The charge in the declaration is (in effect) of a mere *entry*; the defendants, therefore, might have pleaded merely that they entered the house in execution of the writ, and the plea would have been good. [*Parke, B.*—Have you found any precedent in which that allegation is omitted?] No; but it is submitted the plea would not be demurrable without it; the answer to the objection would be, that the plaintiff not having alleged that the door was *shut*, it was not necessary for the defendant to shew that it was *open*. Wherever a defendant pleads an authority under which he acted, and the plaintiff relies on an abuse of that authority, he is bound to reply it. If, indeed, the defendant acts quite independently of the authority, and for another object, the case is different. Thus, in *Lucas v. Nockells* (a), where the object with which the trespass was committed appeared to be altogether different

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(a) 10 Bing. 157; 3 Moo. & S. 627.

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from that stated in the plea, and authorized by the writ, it was therefore held that the plaintiff had a right to prove, under the replication *de injuriâ*, that the defendant came with such different object. But this is clearly no more than an abuse of the authority, just as much as an unauthorized striking of the plaintiff when the officers went to execute the writ would be so. In *Price v. Peck* (a), where, in trespass against a sheriff and his bailiff for imprisoning the plaintiff on a charge of felony, the sheriff justified part of the imprisonment under a *ca. sa.*, and the plaintiff, admitting the writ and warrant, replied *de injuriâ absque residuo causæ*, it was held, that under that replication he could not give evidence to involve the sheriff in the misconduct of the bailiff during the previous part of the imprisonment, but ought for that purpose to have replied the circumstances specially. [*Parke, B.*—The sole question here is, whether the averment in the pleas is material, and whether the defendants can be justified in breaking the dwelling-house under a writ which has nothing to do with the dwelling-house. The uniform course of pleading is of itself very strong to shew, that it is a condition precedent to an exercise of the writ in the dwelling-house that the entry should be by an open door. If it is only a conditional privilege which the officer has of entering the house, in case the door is open, he must aver it in his plea; and then there is no mode of putting it in issue but by the general replication. Lord *Abinger, C. B.*—You do not claim a right to enter generally, but only in case the door is open.] It should rather be put thus—that we have a right to arrest the debtor any where, except in his house when the door is closed. [Lord *Abinger, C. B.*—The right to arrest a man does not carry with it a right to break and enter his house: then it is matter of excuse to shew that the door was open.] The whole jus-

(a) 1 Bing. N. C. 387; 1 Scott, 205.

tification is matter of excuse: the writ is the excuse for taking him at all; then the defendant pleads an incidental right to commit any other trespass in the execution of the writ. [*Parke, B.*—The terms in which the rule is laid down by Lord *Coke*, and adopted in *Comyns' Digest* (a), that the sheriff may enter the house of the defendant *when the door is open*, seem to shew that it is a conditional authority.] That is only a statement of the extent to which the privilege is limited by law. [*Parke, B.*—This is really not an abuse of the authority, but it is executing the authority where the defendant has none, like going out of the jurisdiction to execute the writ.] That distinction would equally apply to all misconduct of officers. This is doing *more* than the law authorizes the officers to do; an excess and abuse, not a total want, of authority.

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Secondly, the learned Judge misdirected the jury in stating, that, as the justification was not fully proved, the jury were to give damages in respect of the whole subject-matter of complaint. The gist of the action was the false imprisonment; but the defendants' evidence shewed, even under the general issue, a legal cause of arrest, and the only illegal act done was in breaking the door. [Lord *Abinger, C. B.*—Where a party, by reason of any irregularity, becomes a trespasser *ab initio*, he cannot justify at all. *Six Carpenters' case* (b). It was therefore that the statute 11 *Geo. 2*, c. 19, s. 19, provided, that a party making a distress for rent should not be deemed a trespasser *ab initio* by reason of any irregularity, but the tenant was confined to an action for the special damage sustained thereby.] That is no doubt true, if the pleas of justification only had been pleaded; but mitigatory circumstances may be given in evidence under the general issue; whereas here the jury were directed to consider the case as if there were no writ or warrant, or other cir-

(a) 5 Co. 92, a; Com. Dig. Execution, (C. 5.)

(b) 8 Rep. 146 a.

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cumstance explanatory of the transaction. Suppose there had been a mere informality of the writ, as its not being properly tested; is the plaintiff to have the same damages in such a case as if the parties entered his house wholly without authority? The whole injury he suffered was in consequence of the arrest.

LORD ABINGER, C. B.—I think, if I had tried the cause, I should probably have said, that if parties, knowing what the law is, wantonly violate it, the jury should not be sparing in the damages. It is the safest way to say, that he who knowingly violates the law in one respect, must take all the consequences.

With regard to the other point, I should be very unwilling to throw a doubt upon the mode of pleading, which, as far as I have known, has been uniformly adopted; and the Court is therefore hardly disposed to grant you a rule: the case, however, may stand over, for you to look into the precedents. If the plea be a good justification without the averment that the door was open, it lets in your argument; but I very much doubt that you will find any such precedent. If you do not mention the case in a day or two, it will be understood that the rule is refused.

PARKE, B.—I believe the result of the uniform course of precedents will be found to be, that the door being open is a condition precedent to executing the writ in the dwelling-house, and therefore that the averment is material: and if so, it is well traversed by the replication *de injuria absque residuo causæ*.

The case not having been mentioned again, on a subsequent day the Court intimated that the rule was

Refused.

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BOLD v. RAYNER.

ASSUMPSIT for not accepting one hundred tons of palm oil bought by the defendant of the plaintiff. At the trial before *Parke, B.*, at the last *Liverpool Assizes*, it appeared that the contract was made in *September, 1833*, by *Messrs. Roscow & Rigg*, brokers at *Liverpool*, who gave the following bought and sold notes:—

“ *Mr. J. B. Rayner.*

“ Sir — We have this day bought for your account, from *J. O. Bold*, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton; also from the same party, one hundred tons ditto for *Messrs. Judson & Wilson*, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, and a fair proportion of breakers, to be taken at an allowance of twenty-four *per cent.*, payment in cash in fourteen days from the delivery of the oil, less 2½ *per cent.* discount. The above-mentioned oil to be delivered by the sellers from the *Speedy or Charlotte*, expected to arrive here about *November or December* next; and should the said vessel be lost, this contract to be void.

“ We are, Sir, your obedient Servants,

“ *Roscow & Rigg.*”

“ *Mr. J. O. Bold.*

“ Sir,—We have this day sold for your account, to *Messrs. Judson & Wilson*, payment in fourteen days by cash, less 2½ *per cent.* discount from delivery, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton; also to *Mr. J. B. Rayner*, payment as above, one hundred tons

A broker gave the following bought and sold notes:—

1. “ We have this day bought for your use, from *J. O. B.*, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash at fourteen days from delivery, less 2½ *per cent.* discount: the above oil to be delivered from the *Speedy or Charlotte*, expected to arrive about *November or December* next.” 2. “ We have this day sold for your use, payment in fourteen days by cash, less 2½ *per cent.* discount from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, *ex Speedy and Charlotte, to arrive.*”—

Held, that evidence of mercantile usage was admissible to explain all the variances between these notes; and that, being so explained, the

variances were not material, and did not avoid the contract.

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dry palm oil, at 31*l.* 10*s.* per. ton, *ex Speedy* and *Charlotte*, to arrive.

“ We are Sir, your obedient servants,

“ *Roscow & Rigg.*

“ N. B. A proportion of breakers to be taken at an allowance of two-and-a-half *per cent.*”

The *Speedy* was lost on her voyage; the *Charlotte* arrived, but not until the 3rd of *May*, 1834. It was proved by a broker in *Liverpool*, that, according to the usage of that port, where nothing is expressed to the contrary in the contract, palm oil is delivered from the quay at the King's (i. e. the landing) weights, and certain known allowances are made; and that, where two vessels are named in the contract, the oil, if in good condition, may be delivered from either, according to the option of the seller. That, if a vessel is *warranted* to arrive by a given time with a cargo of oil, the buyer is not bound to take it, unless she arrives within that time; but if a vessel is named in the contract only as *expected* to arrive at a time mentioned, and she does ultimately arrive, whenever that may be, the buyer is bound to take the oil: so, if two vessels are so named, he is bound to take it from either, whenever she may arrive. For the defendant, it was objected that there were material variances between the bought and sold notes, and that evidence of mercantile usage was not admissible to explain them. The learned Judge overruled the objections, but gave the defendant leave to move to enter a nonsuit; and the plaintiff had a verdict for 836*l.*, the jury finding that, according to mercantile usage, the notes agreed.

Alexander now moved accordingly.—‘There can be no doubt, that if there be any material variance between the bought and sold notes, the plaintiff cannot recover. *Thornton v. Kempster* (a). Now, there are several vari-

(a) 1 Marsh. 355.

ances in substance between these notes.—*First*, the sold note expresses that the oil is sold to be delivered “*ex Speedy and Charlotte, to arrive.*” If, therefore, the vessels arrived without any oil on board, or did not arrive at all, no contract would arise. But the bought note contains in the first place a perfect contract for the delivery of a certain quantity of oil, without any limitation as to the vessel from which it was to be delivered; and though it goes on to say that “the above-mentioned oil is to be delivered from the *Speedy* or *Charlotte*, *expected* to arrive, &c.,” that clause does not control the previous one, which contains a perfect contract, but merely points out the source from which the goods are *expected*. [Lord Abinger, C. B.—I do not agree with that construction; the whole must be taken together; and though the bought note is more extended, it is still a contract to deliver from the *Speedy* and *Charlotte*; and if neither of them arrives, the purchaser is not bound.] Suppose the bought note were the only evidence of the contract; under the former part of it the seller would be bound to supply the oil, from whatever source. [Lord Abinger, C. B.—I think the right construction of the whole is, that the oil was to be delivered from certain vessels expected to arrive.]

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Secondly, the sold note states that the oil is to come “*ex Speedy and Charlotte* ;” the bought note, that it is to be delivered from the *Speedy* or *Charlotte*. Under the former, therefore, the buyer would have the choice of two ships from which to take it, but not under the latter. [Parke, B.—The evidence was, that the *seller*, the party who was to do the first act, had the option to deliver from which he pleased. Lord Abinger, C. B.—If the buyer had such a right as you suggest, it would be satisfied with a gallon only from one of the vessels. And on the other hand, if one of the ships only arrived, the seller might say, I am to deliver from both; I am not bound till both arrive.] Then they must both arrive

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to satisfy the contract expressed in the sold note. [*Parke, B.*—Yes, if you read it strictly *and*; but the evidence was that the custom reads it *or*.]

Then, was parol evidence admissible to explain these variances? Generally speaking, no doubt, evidence of mercantile usage is admissible to explain a mercantile contract; but that is not a universal rule. In *Whittaker v. Mason (a)*, *Tindal, C. J.*, says—“How far a mercantile contract, reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade, within the limits of which the contract was made, and to which it relates, is a question which it would be difficult to answer with exactness and precision.” In *Cross v. Eglin (b)*, the Court appeared to be of opinion that evidence of mercantile men was not admissible to explain words of general import—such as “about” and “more or less”—occurring in a mercantile contract. Here, the words in which the variances occur are no less words of ordinary use and signification. [*Lord Abinger, C. B.*—Parol evidence has been held admissible to shew that, by the custom of a particular district, a thousand rabbits meant twelve hundred (c).] But the words “or” and “and” have no reference to local usage. [*Lord Abinger, C. B.*—‘The Court must look at each contract, and say whether, on its whole spirit and meaning, *and* did not mean *or*, in the understanding of the parties.]

The most material variance, however, occurs as to the time of arrival of the vessels. In the sold note, no time of arrival at all is referred to; in the bought note, it is stated that the ships are expected to arrive in the *November* or *December* following. By the latter, therefore, the buyer would be authorized to make his calculations on

(a) 2 Bing. N. C. 370.

(b) 2 B. & Adol. 106.

(c) *Smith v. Wilson*, 3 B. & Adol. 728.

a delivery within two months; by the former, he might be binding himself for three years. [*Parke, B.*—The evidence on that point was, that the words “*expected to arrive*” created no contract, but were a mere representation: the arrival within a given time must be *warranted*, to make it part of the contract.]

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LORD ABINGER, C. B.—The word “*expected*” is a mere representation, and no part of the contract; although if it were *false*, the contract would be void. I think no rule should be granted.

PARKE, B.—I am of the same opinion. In truth, the only question is whether mercantile evidence was admissible to explain the apparent variances; if so, all the evidence was on one side, and the jury had no difficulty in finding accordingly. And I think it is clear that they were all capable of being explained by usage.

BOLLAND, B.—The one note is an expansion of the other, but they are substantially the same; the former shews the meaning of the shorter terms used in the latter.

GURNEY, B., concurred.

Rule refused.

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WHITE v. ANSDELL.

The condition of a bond recited a deed of dissolution of partnership between the plaintiff and *I.*, in which was recited an agreement, that, subject to the adjustment of the partnership accounts as in the deed mentioned, the stock in trade and partnership effects should belong absolutely to *I.*, and all debts due from the partnership should be paid by *I.*; and that *I.*, and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts; and the condition was, that *I.* and the defendant, or one of them, should indemnify the plaintiff against the payment of the said partnership debts, and all costs, &c., and all actions

to be brought in respect thereof. To a declaration on this bond, which set out the condition, and a breach of it in non-payment of a debt due from the partnership to *M.*, who in consequence sued the plaintiff and *I.* for it, the defendant pleaded, that if the plaintiff was damaged, it was through his own default:—*Held*, that under this plea the defendant could not give in evidence the deed of dissolution, to shew that it contained certain stipulations as to the adjustment of the accounts, which the plaintiff had not performed, not having paid over to *I.* a balance alleged to be due to the latter on such adjustment.

Held, also, that the defendant could not shew, in reduction of damages, that the costs of *I.*'s defence to the action brought by *M.*, were much less than the costs incurred by the plaintiff.

DEBT on bond for 1,000*l.*, subject to a condition which was set out in the declaration. The condition recited a deed of dissolution of partnership between the plaintiff and *F. W. Isaac*, in which was recited an agreement between the plaintiff and *Isaac*, that, *subject to the taking and adjustment of the co-partnership accounts as therein mentioned*, all the stock in trade, money, book-debts, and partnership effects, should belong absolutely to *Isaac*, and that all debts due by or from the co-partnership should be discharged by him out of his own proper monies; and that the said *Isaac*, and the defendant as his surety, should by their joint and several bond indemnify the plaintiff against the said partnership debts. The deed then contained a covenant by *Isaac* to pay the debts and indemnify the plaintiff. The condition of the bond was then stated to be, that *Isaac* and the defendant, or one of them, should indemnify the plaintiff against the payment of *the said* partnership debts, and all costs, charges, &c., in respect thereof, and all actions to be brought against the plaintiff and *Isaac* in respect of the co-partnership debts or transactions. And the breach assigned was, that one *W. Mitchell* had sued the plaintiff and *Isaac* for a partnership debt in the Court of *Common Pleas*; that the plaintiff was arrested and held to bail; that he justified bail; and that *Mitchell* having recovered a verdict in the action for 35*l.*, the plaintiff, on the 29th of *April*, 1834,

rendered himself in discharge of his bail, and remained in prison from that time until the 18th of *June* following, when he was discharged, after having incurred heavy expenses, and being still liable to have judgment recovered against him for the amount of the debt and costs in such action. The declaration then stated, that the plaintiff had incurred great expenses in the procuring special bail, and had sustained great damage and injury by the imprisonment; and concluded by averring, that the defendant had not performed the condition of the bond by indemnifying the plaintiff against the said partnership debts.

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Pleas—*first, non est factum*: *secondly*, that if the plaintiff had been damnified, he had been so damnified of his own wrong, and through his own means and default; which was denied by the replication.

At the trial before Lord *Abinger*, C. B., at the *London* *Sittings* after *Hilary* Term, the plaintiff proved, that after the dissolution of the partnership, *Mitchell*, who was the holder of a bill of exchange accepted by the partnership, sued the plaintiff and *Isaac* upon it, and recovered a verdict for 35*l.*; that the plaintiff having rendered in discharge of his bail, was discharged, after having lain in prison for the period stated in the declaration, by reason of *Mitchell's* having suffered him to be superseded; that his attorney's bill for defending the action amounted to 48*l.* 3*s.*; but he had not paid the debt or costs. *Mitchell* had offered to take a *cognovit*, but the plaintiff refused to give it. On the part of the defendant, it was proposed to shew, by the production of the deed of dissolution, that the engagement of *Isaac* and the defendant to indemnify the plaintiff against the partnership debts was dependent on the adjustment of the partnership accounts according to a stipulation contained in the deed for their adjustment within seven days, which the plaintiff had not performed, although *Isaac* had delivered an account, in which the plaintiff was shewn to be indebted to him in a large

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amount. The Lord Chief Baron was however of opinion, that the evidence was not admissible to control the positive engagement stated in the condition; and that even if it was, the defendant ought to have craved *oyer* of the deed, and set it out on the pleadings; and accordingly rejected the evidence. It was proposed also to ask the attorney who defended for *Isaac* in the action by *Mitchell*, whether his bill was not under 10*l.*; but the question was objected to, and disallowed. The defendant's counsel then urged, that as it appeared that the plaintiff had unnecessarily and wantonly defended the action, and incurred the expenses of such defence without the knowledge or concurrence of the defendant, who was a mere surety, he could, at all events, recover only the costs of the writ; for which they cited *Knight v. Hughes* (a), and *Gillett v. Rippon* (b): but his lordship ruled, that, however this might have been if it had appeared that the plaintiff could have paid the defendant, as it was shewn that he was unable to do so, the jury were to give him such damages as they thought him entitled to under all the circumstances; but left it to them to say whether the costs of the defence had been wantonly incurred. The jury found a verdict for the plaintiff, and assessed the damages at 48*l.* 3*s.*

Erle now moved for a new trial, on the ground, *first*, that the evidence of the deed of dissolution was improperly rejected.—Although that part of the condition which is to be performed by the defendant is in terms absolute, yet it is for the payment of *the said* partnership debts—that is, the partnership debts mentioned in the recital, which were to be ascertained by the adjustment provided for in the deed. Coupling the recitals with the operative part, it becomes a limited, not an absolute, condition. [Lord *Abinger*, C. B.—I thought the condition was absolute

(a) Moo. & M. 247.

(b) Id. 406.

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for payment of the partnership debts, being also for performance of the stipulations in the deed. But at all events, you ought to have pleaded that the plaintiff had not adjusted the partnership debts *modo et forma*; then the plaintiff might have taken issue on that.] The plea pleaded is one well known in the books; the question for the jury upon it was, whether it was or was not the plaintiff's own wrong which prevented *Isaac* from having the means of paying *Mitchell's* debt. One part of the stipulation was, that the plaintiff, the retiring partner, should leave the stock in trade in the hands of the continuing partner; if he failed to do so, the non-payment of the debt by the continuing partner is the default of the retiring partner. The responsibility to pay the debts is not absolute, but subject to the adjustment, as mentioned in the deed. [Lord *Abinger*, C. B.—You should have shewn in pleading that the bond was only conditional. Your defence in effect is, that the plaintiff has not performed his condition. *Alderson*, B.—You plead that you would have indemnified, but that the plaintiff was damnified of his own wrong: then you want to shew that you were not bound to indemnify. *Parke*, B.—You might have shewn under this plea that there was a good answer to *Mitchell's* action, but that the plaintiff failed to bring it properly forward; and I should have thought the plea pointed to such a defence.] The non-payment by the plaintiff to *Isaac* was a default by him, in consequence of which the latter could not pay the debt due to *Mitchell*; if therefore the plaintiff was damnified by the non-payment by *Isaac*, it was by his own wrong.

Secondly, the defendant had a right to shew, in reduction of damages, that the expenses incurred in *Isaac's* defence to the same action were much less than the plaintiff claimed; and therefore, that the charges in the plaintiff's bill must have been exorbitant or unnecessary. [Lord *Abinger*, C. B.—I thought it had nothing to do

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with the case, that one attorney defended more cheaply than another.]

PARKE, B.—The plaintiff appears to have been imprisoned, to have incurred the expenses of the render in discharge of bail, of a *supersedeas*, &c., in addition to the ordinary expenses of the defence. I think the defendant is very well off, in having the case left to the jury so favourably for him as it was. His covenant was to pay the partnership debts; if, in consequence of his not performing that covenant, the plaintiff has been obliged to incur expenses, and has suffered personal inconvenience and injury, I do not know why he should not recover damages for the whole; therefore, if the summing up were at all to be found fault with, it would be that it was too favourable to the defendant. On the other ground, I am clearly of opinion, that the Lord Chief Baron was quite right in rejecting the evidence: the condition is absolute, and when you look at the deed (a), it is absolute too.

The rest of the Court concurred.

Rule refused.

(a) The deed of dissolution had been handed up for the inspection of the Court.

GROUNSELL v. LAMB.

Assumpsit for goods (a machine) sold and delivered:—

Held, that the defendant might shew under the

general issue, that the machine was manufactured by the plaintiff for the defendant, under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant.

Held, also, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the *quantum valebat*, without shewing some new implied contract arising from the defendant's dealing with the goods.

ASSUMPSIT for goods sold and delivered.—Pleas, *first, non-assumpsit; secondly*, the Statute of Limitations; *thirdly*, that the goods had been re-delivered to and

accepted by the plaintiff. At the trial before Lord *Abinger*, C. B., at the *Warwick* Assizes, it appeared that the action was brought to recover the sum of 33*l.*, the price of a cutting machine manufactured by the plaintiff for the defendant. The defendant proved that the machine was made under a special contract, with a stipulation that if it did not work, nothing should be paid for it; and that when tried, it could not be made to work at all, and was altogether useless. This evidence was objected to as not being receivable under the general issue, but the objection was overruled. The defendant attempted also to shew that the machine had been re-delivered to the plaintiff, but failed in doing so. The jury, under the direction of the learned Judge, found a verdict for the defendant.

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Whitehurst now moved for a rule *nisi* for a new trial, but admitted that it was difficult to distinguish the case from *Cousins v. Paddon* (a). He submitted, however, that the plaintiff was entitled to some damages, since the materials of the machine must be of some value, and it had not been returned to the plaintiff.

LORD ABINGER, C. B.—Here the defendant shewed a special contract, on which the plaintiff had not declared, and having a condition annexed to it, which prevented the implied contract declared upon from arising.

PARKE, B.—To entitle the plaintiff to any damages on the *quantum valebat*, he ought to have shewn some new implied contract, resulting from the defendant's conduct or dealing with the goods.

Rule refused.

(a) 2 C. M. & R. 547.

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HARDING v. STOKES.

A declaration for a penalty under the 5 & 6 Will. 4, c. 76, s. 54, for bribing a voter in the election of councillors, by "corruptly promising to give him employment in hauling stones at certain hire, as and for a reward to give his vote for" particular candidates, was held good on demurrer; for an employment is a reward within the latter as well as the former branch of that section: and whether the employment in the particular case was given by way of corrupt bargain, was a question for the jury, but the Court must assume that such was the case, a corrupt agreement being sufficiently alleged in the declaration.

Held, also, that an allegation that an election of councillors took place under the act, and that the defendant, not regarding the

statute, corrupted the party to vote in such election, was a sufficient statement that the offence was committed after the passing of the act.

DEBT for a penalty of 50*l.* alleged to have been incurred under the 5 & 6 Will. 4, c. 76, s. 54. The declaration stated, that the borough of *Bristol* is a borough in which, by a certain act of Parliament made and passed in the sixth year of the reign of his present Majesty, intituled, "An Act to provide for the Regulation of Municipal Corporations in *England* and *Wales*," it was provided and directed that an election should be had and made of a certain number of fit persons, who should be and be called the councillors of the said borough; that heretofore, to wit, on the 26th of *December*, 1835, the election of such councillors took place in pursuance of the said act; and before and at the said election, *R. P.*, *J. B.*, and *H. G.*, were candidates to be elected as councillors of the said borough. And the plaintiff in fact saith, that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on the 24th day of *December*, in the year last aforesaid, did corrupt one *J. W.*, who then and from thenceforth, until and at the time of the said election, had a right to vote in the said election, to give his vote in that election for the said *R. P.*, *J. B.*, and *H. G.*, so being such candidates as aforesaid, by then corruptly promising to give the said *J. W.*, if he should vote in the said election for the said *R. P.*, *J. B.*, and *H. G.*, employment in hauling stones, at and for certain hire and reward to be paid for the same; which said employment was so then promised by the said defendant to the said *J. W.* as and for a reward to the said *J. W.* so to give his vote for the said *R. P.*, *J. B.*, and *H. G.*, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the defendant

forfeited for his said offence the sum of 50*l.*, and an action hath accrued, &c.

General demurrer and joinder.

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The points stated for argument on the part of the defendant were as follow:—The defendant contends, that inasmuch as in the statute 5 & 6 *Will.* 4, c. 76, s. 54 (a), the word *employment* is used with reference to the voter, but not to the person influencing the voter, the defendant did not become liable to the penalty by promising employment to the voter; that the employment of hauling stones is not a gift or reward within the meaning of the statute; that although employment at unreasonable wages might have been within the statute, the declaration does not state such a case, and it ought to have enabled the Court to see that an offence had been committed within the statute; and that it is consistent with the declaration that the alleged promise to the voter was made before the passing of the statute.

Whateley, in support of the demurrer.—There are four objections to this declaration. *First*, the offer of an *employment* by the defendant, assuming it to have been made with the purpose of corruptly influencing the voter, is not

(a) Which enacts, “that if any person, who shall have or claim to have any right to vote in the election of mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passing of that act, ask or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, *employment*, or other reward whatsoever, to give or forbear to give his vote in any such elec-

tion; or if any person by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any *gift or reward*, corrupt or procure, or offer to corrupt, any person to give or forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall, for every such offence, forfeit the sum of 50*l.*, to be recovered by action of debt,” &c., &c.

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an offence within the 5 & 6 *Will.* 4, c. 76, s. 54. The *taking* or *receiving* an employment with such a purpose would no doubt fall within the first clause of the section, which expressly provides for the case of a bribe by means of an employment; but that word is omitted in the latter clause. *Secondly*, such an employment as this cannot properly be said to be either a *gift* or a *reward*; it is a mere service, and the payment for it is earned by the labour of the party. But, at all events, in the *third* place, as it must be assumed upon this declaration that the voter was to receive no more than the ordinary wages for that labour, the giving or promising of them cannot constitute any offence. If exorbitant wages had been promised, that might be deemed in the nature of a bribe; but it is not alleged that such was the case. And it may be observed, that the declaration departs from the ordinary form, in not stating the terms of the engagement; that has always been held necessary—for instance, in actions for penalties, under the statute of *Anne*, for playing at unlawful games. *Lastly*, there is no allegation that the corrupt agreement was made after the passing of the act. This is a penal statute, and ought not to be extended beyond its strict words.

Addison, contra.—The interpretation to be put upon the general term *reward*, in the latter part of the section, is supplied by the former words, which mention an employment as one species of reward: which, therefore, is equally comprehended in the more general terms which apply to the corrupter. It would have been mere useless verbiage to repeat all the specific words stated before. [*Parke, B.*—If the construction contended for by Mr. *Whateley* be correct, the giving or promising of *money* would not come within the operation of the second branch of the clause.] The 49 *Geo.* 3, c. 118, which enacts that the giving or promising to give or procure an employment, in order to

induce a party to procure the return of a member to Parliament, shall be liable to a penalty, shews that the legislature consider the giving of an employment for the purpose of corrupting votes as a species of bribery, which ought to be repressed. It is true, this is a penal statute; but, as was said by *Coleridge, J.*, in *Henslow v. Fawcett* (a), where a similar question was discussed, the Court “must not, by over-refining, defeat the obvious intention of the legislature.” With respect to the other objections, the hauling of stones is clearly an employment, and therefore a reward; there can be no doubt that the engagement to employ the voter might be of great benefit to him; and although the terms of the contract are not set out, enough is alleged to show that it was a contract for an employment. Lastly, it sufficiently appears on the whole declaration, that the offence was committed after the passing of the act. It states that an election of councillors took place under the act, and that the defendant, not regarding the statute, corrupted a party having a right to vote at such election. None of these proceedings could have taken place until the statute was in force.

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Whateley was heard in reply.

LORD ABINGER, C. B.—I think this is a case within the act of Parliament. If it appeared on the language or intention of the act, that any of the words in the one branch of this clause could not be included in the other, the case would be different; but an employment is undoubtedly one species of reward, and the words “any gift or reward whatsoever” seem to me as only embracing, in more general terms, all that had been more specifically stated before. Whether this employment was, in the particular case, given as a reward within the object of the act, would be

(a) 3 Ad. & Ell. 51; 4 Nev. & M. 592.

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a question for the jury. The legislature seem to have considered that an employment, from which a man may derive his sustenance, may be held out in the nature of a reward to corrupt his vote ; and it may more especially be used as a means of corruption where there are many candidates, and probably little work of the kind to be done. With respect to the other objection, in much more serious cases than this—in indictments for forgery, for instance—the offence is only stated to have been committed contrary to the form of the statute ; it is never alleged that it was committed since the statute. I am of opinion, therefore, that our judgment ought to be for the plaintiff.

PARKE, B.—I am of the same opinion. It seems to me that this declaration is sufficient. The first, and in truth the only question in the case, arises on the construction of the act of Parliament—whether any difference is made between the asker and the offerer of a gift or reward, as to the nature of the thing asked or offered ; and I think there is not. What is the “ gift or reward ” contemplated in the latter branch of this clause ? To ascertain that, we must look to the former part of the section, and there we find in conjunction the words “ any money, gift, office, *employment*, or *other* reward whatsoever.” An employment, therefore, is here considered as being a reward ; and by the common sense of mankind it is so, where the party to whom it is offered wants employment. It falls, therefore, equally within the more general words of the latter branch of the clause. Then we are to look at the declaration, to see whether it contains a sufficient averment of a corrupt offer within the statute ; and I am clearly of opinion that it does. It is stated that the defendant corrupted *W.* to give his vote for certain candidates by corruptly promising to give him employment in hauling stones at certain hire, which employment was so promised as and for a reward to *W.* to give his vote for the

candidates in question. It must, no doubt, be proved before the jury to have been so done, else the offence prohibited by the act is not made out. As to the other objection, that it is not shewn that the corrupt offer was made after the statute, I think the answer given to it by *Mr. Addison* is quite satisfactory.

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BOLLAND, B.—This act is remedial as well as penal, and the object of the legislature clearly was to reach such a case as this.

ALDERSON, B.—I am of the same opinion. The first branch of the clause subjects to a penalty the voter who contracts to give or forbear to give his vote for money, gift, office, employment, or other reward; the second branch is directed against the parties who make a corrupt agreement with the voter, that he shall give or forbear to give his vote for any gift or reward. As it includes an employment in the first branch, so it does also in the second. Whether, in the particular case, it was a valuable reward, is a question for the jury. If only the ordinary wages were to be given, they might probably find that the employment was not given for a corrupt reward; but that is not for the Court. Here it is averred that the employment *was* promised as a reward for the vote, contrary to the statute. If we are to investigate the condition of parties, to see what is such an employment as would operate upon them as a bribe, we must also investigate their minds and characters. Undoubtedly, this reward would be a punishment for some men, though it would be a reward for others.

Whateley then applied for leave to amend, this being the first case decided under the act; which the Court granted, on payment of costs; otherwise,

Judgment for the plaintiff.

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DOE *d.* BEARD *v.* ROE.

A notice given by a landlord in ejectment, under the 1 Geo. 4, c. 87, s. 1, signed "*A. B.*, agent for the *plaintiff*," is sufficient.

Such a notice is sufficient, although it only requires the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of Parliament," without going on to state those purposes in detail.

GASELEE had obtained a rule *nisi* to rescind an order made by *Gurney*, B., at chambers, by which the declaration and notice given in this ejectment, under the statute 1 Geo. 4, c. 87, s. 1, were set aside for irregularity.

Mansel shewed cause, and objected in the first instance, that there was no affidavit of what passed before the learned Judge at chambers, the rule having been obtained on the statement of counsel only. In the absence of such affidavit the only questions that could now be entertained were, whether the learned Judge had jurisdiction, and whether the order was a legal order in its terms; on neither of which grounds could any objection be maintained. And it being admitted on the other side, that the only object of the rule was, to discuss the sufficiency of the notice, it was on this ground

Discharged without costs.

A fresh rule having been subsequently obtained on the proper affidavit,

Mansel again shewed cause, and contended that the notice of declaration was insufficient. *First*, it was signed "*A. B.*, agent for the *plaintiff*," whereas it should have been "agent for the *lessor of the plaintiff*," or, "for the landlord." The landlord is the party referred to by the act of Parliament, and who is to give the notice therein mentioned; and though, no doubt, he may give it by an agent, the party must be stated to be *his* agent, not, as, strictly speaking, is the case here, the agent of the nomi-

nal plaintiff. The provisions of an act giving such large assistance to landlords in the recovery of property ought to be strictly construed and strictly pursued. [*Parke, B.*—It is quite sufficient if there be a notice addressed by the landlord, who is proceeding by the action of ejectment for the recovery of possession, to the tenant, requiring him to appear and give bail, pursuant to the statute. Can there be a doubt that such notice is given here?] There is another objection. The act says, that the party is to appear for the purposes thereafter specified—namely, that he may be ruled to enter into the undertaking and recognizance required by the act, or in default thereof, that judgment may be entered up against him. The notice, therefore, ought to give him full information of what these requisitions are; whereas this notice merely calls on the plaintiff to appear to be made defendant, &c., and to find such bail, if ordered by the Court; “and for such purposes as are specified in the act of Parliament.” [*Alderson, B.*—Then, if he looks at the act, he will see what the purposes are.] The notice ought to inform him; it is very improbable that persons in such a class of life as these notices are usually addressed to, should be able to refer to the act.

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Gaselee, contra.—The form of this notice is that given by Mr. *Tidd* (a), and which is uniformly adopted. And though it may not distinctly apprize the tenant of all that he is to do, the service of the rule *nisi* will give him full notice, and will point out to him the penalty he incurs by standing out, and the judgment that may pass against him.

PARKE, B.—I think this notice is sufficient. I do not

(a) *Tidd's Forms*, p. 189, (6th edit.) But in the following page, a more special form is also given, specifying all the subsequent proceedings under the statute.

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see of what advantage it would be to the party to know all those other matters in the first instance.

ALDERSON, B.—In what way is he prejudiced by not having this information in the notice?—he has the rule *nisi* afterwards, which apprizes him of the whole proceedings.

Rule absolute.

PERSE v. BROWNING.

Where an affidavit of debt was sworn in *Ireland*, before a commissioner of *Common Pleas* and *Exchequer*:—
Held, that the title of the Court need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such commissioner, to be afterwards intitled and used in either Court.

BAYLEY moved for a rule to take out of Court the money paid into the hands of the sheriff in lieu of bail in this cause, and to enter a common appearance, on the ground of several alleged irregularities in the *capias* and affidavit of debt: one of which was, that the title of the Court in the heading of the affidavit (which had been sworn in *Ireland* before a commissioner of the *Common Pleas* and *Exchequer*), appeared to be in a different handwriting from the body of the affidavit, and to have been inserted after it was sworn, in the same handwriting in which the *capias* was filled up.

PARKE, B.—I think that objection is of no avail, if the fact was so: it is not necessary that the title of the Court should be there when the affidavit is sworn. If the person before whom it was sworn was, in fact, an officer of the *Exchequer*, he might administer the oath in that Court. The affidavit might be taken before him, to be afterwards intitled and used either in the *Common Pleas* or the *Exchequer*, as the case might require.

It appeared, however, that the *capias* was addressed to the sheriffs, instead of the sheriff of *Middlesex*; and on that ground the rule was made absolute to set aside the writ, with the costs of this application: no action to be

brought against the plaintiff or the sheriff, and the plaintiff to be at liberty to arrest the defendant again.

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Rule accordingly.

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Humfrey shewed cause in the first instance.

GOODCHILD v. PLEDGE.

DEBT, in the sum of 20*l.* for goods sold and delivered; for board, lodging, and other necessities, found and provided by the plaintiff for the servant of the defendant, and at his request; and on an account stated. *Pleas—first, nunquam indebitatus; secondly*, as to the first count, that before the commencement of the suit, and when the said sum of 20*l.* in that count mentioned became due and payable, to wit, on the 1st of *January*, 1836, the defendant paid to the plaintiff the said sum of 20*l.*, according to the defendant's said contract and liability in the said first count mentioned: concluding to the country. The latter plea was specially demurred to, on the ground that it ought to have concluded with a verification.

Debt for goods sold and delivered. *Plea—*that before the commencement of the suit, and when the said sum of 20*l.* became due and payable, to wit, on &c., the defendant paid the plaintiff the said sum of 20*l.* according to the defendant's said contract and liability; concluding to the country:—*Held* bad on special demurrer, for not concluding with a verification.

Mansel, in support of the demurrer, relied on *Ensall v. Smith (a)*. The plea of payment is clearly treated in the new rules as a plea in confession and avoidance. It makes no difference that it is stated here, that the defendant paid when the money became due according to the contract: he still admits the cause of action. The plea of *solvit ad diem* is an analogous one. [*Parke*, B.—There it is clearly new matter, being, in effect, a plea of performance of the condition in the bond.] The plaintiff has a right to an answer to the allegation of payment in the

(a) 1 C. M. & R. 522; S. C. nomine *Ansell v. Smith*, 3 Dowl. P. C. 193.

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plea; and if it be true that the money was so paid, he may enter a *nolle prosequi* as to that part of the demand, and go on for the rest.

Ogle, contrà.—This plea is quite distinguishable from that in *Ensall v. Smith*. Here the declaration is in *debt*, not in *assumpsit*; and the defendant meets the claim by stating, that, when the debt accrued, he paid the money according to his contract and liability. In *Ensall v. Smith*, the plea was merely, that the defendant *has paid* the same: but here, if the payment was after breach, or after request, it could not be according to the contract and liability. It is a simple denial of the breach, not introducing new matter, and therefore rightly concludes to the country. The defendant shews that there never was any suable cause of action, because the moment the debt accrued, he paid it. [*Parke, B.*—Is the statement of the breach in debt anything more than a mere form? The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant? If the breach is mere form, you cannot traverse it; then your plea is in discharge, and ought to conclude with a verification. Suppose *nil debet* pleaded, under the old form; would it not be sufficient to prove the debt contracted? The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge.] This plea shews that the plaintiff never was entitled to sue.

LORD ABINGER, C. B.—If this is *payment*, as it undoubtedly is, it is a plea in confession and avoidance within the new rules.

PARKE, B.—I admit that this plea is distinguishable

from that in *Ensall v. Smith*. But here also the defendant includes in the plea a something that is not alleged in the declaration; because it is not stated in the declaration that the defendant did not pay according to the contract. I think it will be found, on looking into the cases, that the statement of the breach is mere form; if so, the plea admits the *debt*, and is a plea in confession and avoidance; and it is so treated in the new rules. Under the general issue, as now framed, you deny the existence of a debt at any one time: if you admit a debt, you must plead every matter specially by which you seek to discharge it.

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ALDERSON, B.—If this is payment, it is payment of a *debt*; then it admits a debt; therefore it is in discharge, not in denial.

Ogle then obtained

Leave to amend, on payment of costs.

BRIND v. HAMPSHIRE.

TROVER for a foreign bill of exchange, drawn at *Honduras*, dated 28th *August*, 1835, purporting to be drawn by *Hyde & Forbes* upon and accepted by *Hyde & Company*, being for the payment to *William Usher, Esq.*, or order, of 300*l.* sterling, at ninety days' sight, and purporting to be indorsed by the said *William Usher* to the order of *Mrs. Frances Brind*.—*Third* plea, that heretofore, to wit, on the 21st of *October*, 1835, he the defendant received

A., resident abroad, remitted a bill to *B.*, his agent in *England*, drawn by *A.*, and specially indorsed by him to *C.*, with whom his children were at school, in payment of *C.*'s account for their board and edu-

cation. *B.* got the bill accepted by the drawees, and sent a letter by post to *C.*, stating that he had received a commission from *A.* to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in *B.*'s hands, he received directions from *A.* to keep it, and the proceeds, in his hands, and to have a fair investigation into *C.*'s accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and *B.* detained the bill:—*Held*, that *C.* could not recover it in trover.

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the said bill of exchange from the said *William Usher*, from parts beyond the seas, to wit, from *Belize, Honduras*, and was then directed by the said *William Usher* to hand over to Mrs. *Brind*, the wife of the plaintiff, the said bill of exchange; but before the defendant could hand over to the said Mrs. *Brind* the said bill of exchange, and without any negligence or improper delay on the part of the defendant, and before any demand of the said bill of exchange by the plaintiff or the said Mrs. *Brind*, and whilst the same was in the hands and possession of the defendant on the direction and for the purpose aforesaid, to wit, on the 24th of *November*, 1835, the said *William Usher* countermanded and revoked the said direction, and then directed the defendant to keep the said bill of exchange and the proceeds thereof in his the defendant's hands, and not to hand over or deliver the said bill of exchange or pay the proceeds thereof to the said Mrs. *Brind* or the plaintiff; whereupon he the defendant, pursuant to such revocation and countermand and subsequent direction of the said *William Usher* to keep the said bill in his the defendant's hands, and the proceeds thereof as aforesaid, and not to pay the same to the said Mrs. *Brind* or the plaintiff on the day and year aforesaid, did keep the said bill of exchange, and then detained and still detains the same in his the defendant's hands and possession, and refuses to hand over or deliver the same to the said Mrs. *Brind* or the plaintiff, for the cause aforesaid, and as he the defendant might and still may lawfully do for the cause aforesaid, and which is the said detaining, &c., whereof the plaintiff hath complained, &c.

Replication—that before the bill was received by the defendant as in the said plea mentioned, to wit, on the day first aforesaid, the same had been indorsed by the said *William Usher*, and he by that indorsement had ordered and appointed the said sum of money in the said

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bill mentioned to be paid to the order of the said Mrs. *Brind*, the wife of the said plaintiff; and that at the time of the detention thereof, the said indorsement remained thereon in full force and effect: and the plaintiff further saith, that afterwards, and after the receiving of the said bill by the defendant for the purpose in the said plea mentioned, and before the detention thereof, and before the countermand and revocation in the said plea mentioned, to wit, on the day first aforesaid, he the said defendant caused the said bill to be presented for acceptance, and caused the said to be accepted by the drawees; and that after the said acceptance, he the said defendant had and held the said bill for the plaintiff for the purpose aforesaid; and that after the said acceptance, and while the defendant so held the said bill for the purpose aforesaid, and before the countermand and revocation in the said plea mentioned, to wit, on the day first aforesaid, the defendant gave notice to the said Mrs. *Brind*, that he had received the said bill and then held the same for the purpose aforesaid, and he then desired to be informed by the said Mrs. *Brind* when and how the same should be delivered, and he then undertook and promised that such information should be attended to; and the said defendant then requested the plaintiff to pay the expenses of the conveying of the said notice from him the defendant to the said Mrs. *Brind*; and the plaintiff further saith, that in pursuance of such request he the plaintiff did afterwards, and before the said countermand and revocation, to wit, on the day first aforesaid, pay the expense of the conveying of the said notice, to wit, &c., whereof the defendant afterwards, to wit, on &c., had notice.

Rejoinder, that at the time and after he the defendant received the said bill from the said *William Usher* as in the said plea mentioned, the said bill remained, and thence hitherto has always remained, and still is, in the hands and possession of the defendant as the

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agent of and for the said *William Usher*, and subject to his direction, order, and control: and that whilst the said bill so remained and was in the hands and possession of the defendant, the said *William Usher*, for good and sufficient reasons him thereto moving, did revoke and countermand the said direction, and then directed the defendant to keep the said bill of exchange and the proceeds thereof in his the defendant's hands, and not to hand over or deliver the said bill or pay the proceeds thereof to the said Mrs. *Brind*, or to the plaintiff, as in the said plea mentioned: and the defendant further saith, that before and at the time and after the defendant so received the said bill from the said *William Usher*, the said Mrs. *Brind* kept a school for the board, lodging, and education of young persons, and divers, to wit, three children of the said *William Usher* were and had been at school with the said Mrs. *Brind* before and at the time the defendant received the said bill as aforesaid, and had during that time been educated, boarded, and lodged by the said Mrs. *Brind*; and the said Mrs. *Brind*, in respect of and for the said board, education, and lodging, had, before the said *William Usher* remitted the said bill to the defendant for the purpose aforesaid, delivered certain accounts, whereby the said *William Usher* appeared to be indebted to the said Mrs. *Brind* in divers large sums of money; and the said *William Usher* for a long space of time, to wit, before and at the time of the said board, education, and lodging being supplied and given to the said children as aforesaid, and thence hitherto, had been and was, and still is resident in parts beyond the seas, to wit, at *Belize* in *Honduras*; and before he the said *William Usher* did or could examine the said accounts so delivered by the said Mrs. *Brind*, he had forwarded and caused to be delivered the said bill of exchange to the defendant, for the purpose in the said plea mentioned: and the defendant further saith, that afterwards, and be-

fore the defendant did or could deliver the said bill to the said Mrs. *Brind*, and whilst the same remained and was in the hands of the defendant as the agent of and for the said *William Usher*, and subject to his directions as to the said bill, he the said *William Usher* revoked and countermanded the said direction to the defendant, and directed him to keep the said bill and the proceeds thereof in his the defendant's hands, &c., and also then and there directed the defendant to have a fair scrutiny into the said Mrs. *Brind's* accounts, and, after a fair investigation, to pay her what might be due to her: whereupon the defendant, still being the agent of the said *William Usher*, and acting under his said directions, refused to pay over the said bill or the proceeds thereof to the said Mrs. *Brind*, and hath detained and still detains the same: and the defendant further saith, that on the 24th day of *October*, 1835, he, the defendant, wrote a letter to the said Mrs. *Brind*, that he the defendant had received a commission from the said *William Usher* to pay her some money on account of his the said *William Usher's* children, which is the said notice in the replication mentioned to have been given by the defendant to the said Mrs. *Brind*, and therein alleged to be a notice that the defendant had received the said bill for the purpose in the said replication in that behalf alleged: and the defendant further saith, that such notice was sent by the defendant by and through the general post to the said Mrs. *Brind*, and the defendant not having paid the postage thereof, the said Mrs. *Brind* or the plaintiff paid the postage of the same, which is the said expense of conveying the said notice from him the defendant to the said Mrs. *Brind* in the said replication mentioned: and the defendant saith, that by reason of the premises, he did detain and doth still detain in his hands the said bill of exchange, and that he has had no fair scrutiny or investigation of the said accounts, and that he hath always been and still

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is ready on a fair scrutiny into the said Mrs. *Brind's* accounts, and after a fair investigation, to pay her what may be due to her, pursuant to the said directions of the said *William Usher*, &c.

Surrejoinder, that the said revocation and countermand, and the said direction by the said *William Usher*, in the plea and rejoinder mentioned, was first had and received by the defendant, to wit, on the 28th day of *October*, 1835, and that the said revocation &c. were not first had or received by the defendant until after the defendant caused the said bill to be accepted, and after the same had been accepted, by the drawees, and until after the defendant gave the said notice to the said Mrs. *Brind*, that he had received the bill for the purpose in the said plea mentioned, and that he held the same for that purpose, and until after the defendant desired to be informed by the said Mrs. *Brind* when and how the same should be delivered, and until after the defendant undertook and promised that such information should be attended to, and until after the plaintiff paid the expense of conveying the said notice from the defendant to the said Mrs. *Brind*, as in the said replication alleged; concluding to the country.

Special demurrer, assigning several causes, which it is not material to state. The following ground of general demurrer was also stated in the margin of the demurrer book:—That the surrejoinder is bad in law, because it appears by the pleadings, and is admitted by the surrejoinder, that the defendant is the agent of Mr. *Usher*, and that the bill remains in the defendant's hands the same as in Mr. *Usher's*, indorsed, but not delivered over to the indorsee Mrs. *Brind*, and no property in the bill has therefore passed to her, or vested in her husband in her right.

Hoggins, in support of the demurrer, having stated the

pleadings, and referred to *Williams v. Everett* (a), was stopped by the Court.

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Barstow, contrà.—The principle established in *Williams v. Everett* is not precisely applicable to this case. That was an action for money had and received; this is an action specifically to recover a bill, which has been indorsed over so as to pass the right in it to the plaintiff. [*Parke, B.*—Rather, which was intended to be indorsed—there was no delivery to the indorsee.] That is not necessary in the case of a special indorsement to a particular party. In an action on the bill, it would not have been necessary to aver delivery to the plaintiff. [*Parke, B.*—No; because it is implied in the allegation of indorsement. Lord *Abinger, C. B.*—Suppose *Usher* had indorsed the bill, and kept it in his own possession, would the plaintiff have any property in it? If not, then is not the defendant merely *Usher's* agent?] It is not competent to the defendant to say he did not hold the bill for the person to whom it was to be handed over according to the directions he received; particularly after having left it for acceptance with such indorsement upon it. The acceptance, under such circumstances, created a contract between the defendant and the special indorsee, to pay to her according to the indorsement. [*Parke, B.*—The acceptance admits nothing but the drawing; it admits no indorsement: the acceptor may be presumed not to look at any indorsement, till he is called on to pay the bill.] There are authorities to shew that the drawee is bound to look to the indorsement, where it is a restricted one. [Lord *Abinger, C. B.*—Yes, when he pays the money; not when he accepts the bill. You must argue, that if the drawer himself took the bill for acceptance, he could not, the next day, renounce his intention of paying it over to the party whose name he had

(a) 14 East, 582.

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indorsed on it.] There was also notice given to the plaintiff; after that, the authority was irrevocable. There are authorities, too, to shew that an authority given on good consideration is irrevocable: here it appears on the pleadings that there was a debt due to Mrs. *Brind*, though the state of the accounts is disputed. Some expense, also, was incurred by the plaintiff, in consequence of the notice. The combination of all these facts gives the plaintiff a title to the possession of the bill.

LORD ABINGER, C. B.—It seems to me, that the case is exactly the same as if *Usher* had himself carried the bill for acceptance, having first indorsed it, to the plaintiff: if no action of trover could have been maintained against him in such case, neither can it against the defendant. There is nothing disclosed to shew any change in the character of the defendant's agency: it does not appear that he has contracted any new relation with the plaintiff, so as to alter his character as agent of *Usher*: it is, in fact, just the same thing as if *Usher* had sent a servant with the bill to the indorsee, and, instead of delivering it, he had brought it back; could not *Usher* then have said, "Give it me; I will not pay it over now?" It is not because the agent has not done precisely what the principal desired him to do, that the property is changed.

PARKE, B.—I am of the same opinion. I see nothing whatever which could transfer the property from *Usher* to the plaintiff. With regard to the communication made by the defendant to the plaintiff, even supposing it to have been that he held the *bill* itself for his use, that would not have the effect of transferring the property: the direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the

latter a right of action against the former. That was the doctrine laid down in *Williams v. Everett* and *Scott v. Porcher* (a). Now, it is clear this bill was not handed over: then is anything disclosed to shew a binding obligation as between the defendant and the plaintiff? I am clearly of opinion that there is not. The utmost effect that can be given to the notice referred to, is, that the defendant states that he has received the bill for the use of the plaintiff; but there is no contract by him to hold it as agent for the plaintiff for any new consideration, nor any assent by the plaintiff to the defendant's holding it as his agent. There is nothing whatever to shew that the plaintiff could not still sue *Usher* on the original consideration, and require the money to be paid to him *instantly*. Nothing whatever has passed to alter the relation of the parties—nothing more than an inchoate contract, if I may so say, by which the defendant promises to hold the bill for the plaintiff, in case the plaintiff assents so to receive payment.

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BOLLAND, B.—I am of the same opinion. Although *Williams v. Everett* was an action in a different form, I think the same principle which was laid down in that case ought to govern the present, and that there is nothing shewn to alter the property in this bill. The only question is, whether there is anything to differ the case from *Williams v. Everett* in what has been done between the party to whom, and the party for whose use, the bill was remitted. The principle on which that case was put was, as stated by Lord *Ellenborough* (b), that the remittees “may hold the bill till received, and its amount when received, for the use of the remitter himself, until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded

(a) 3 Meriv. 652.

(b) 14 East, 596.

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themselves from so doing, and have appropriated the remittance to the use of such person." But instead of that, what is done here? There is, certainly, the letter of the defendant agreeing to hold for the plaintiff, but there is no assent of the plaintiff to receive it as payment: it is only an inchoate offer, on the part of the agent, to hold the bill for the remittee, if he assents. I find no such *appropriation* here as is referred to by Lord *Ellenborough*.

ALDERSON, B., concurred.

Judgment for the defendant (a).

(a) See *Wedlake v. Hurley*, 1 C. & J. 83.

ADAMS v. WORDLEY.

Assumpsit by the drawer against the acceptor of two bills of exchange, payable respectively six and twelve months after date.

The plea set forth an agreement (not stated to be in writing) between the plain-

ASSUMPSIT by the drawer against the acceptor of two bills of exchange, dated 29th *December*, 1834, for 45*l.* each, payable, one six months, the other twelve months after date. *Plea*—That long before the making by the plaintiff, and the accepting by the defendant, of either of the said bills of exchange, to wit, on the 23rd of *January*, 1826, the defendant and *John Gaitt* had made their certain joint and several promissory note in writing, and thereby jointly and severally promised to pay to Messrs.

plaintiff and defendant, by which, before the making of the bills, it was agreed that the defendant should be discharged from all liability in an action commenced against him by the plaintiff on a promissory note, on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question,—in case the plaintiff should recover in another action brought by him against another party, on a promissory note given under similar circumstances to the defendant's; and that until he should so recover, or if he should not so recover, he should not call for payment of the bills of exchange: and the plea averred that the defendant accordingly paid the costs and money agreed for, and accepted the bills of exchange in question and that the action against such third party was still undetermined:—*Held*, on demurrer, that the plea was bad; inasmuch as the defendant could not vary the absolute contract entered into by the bills of exchange by a contemporaneous oral contract inconsistent with it.

Henry Wyatt & Sons, or their order, 300*l.* for value received, with interest at 5*l. per cent. per annum* from the date thereof, and which said promissory note the said *H. Wyatt & Sons* afterwards, and before the making and accepting of either of the said bills of exchange, to wit, on the 31st of *October*, 1831, indorsed to certain persons using the name, style, and firm of Messrs. *Wyatt & Thompson*; and afterwards, and before the making and accepting of either of the said bills, to wit, on the day and year last aforesaid, the defendant paid to the said persons so using the name, &c. of Messrs. *Wyatt & Thompson* as aforesaid, the said sum of money in the said promissory note specified, with the interest thereon; that the said *Wyatt & Thompson* then undertook and promised the defendant to re-deliver the said promissory note to him on request, but have hitherto neglected and refused so to do. And the defendant further saith, that afterwards, and before and at the time of the making of the said bills of exchange, to wit, on the 29th of *December*, 1834, two actions had been and then were pending in the Court of *Exchequer*, in one of which actions the said plaintiff was the plaintiff, and the said defendant was defendant, and in the other of which the said plaintiff was the plaintiff, and the said *John Gaitt* was the defendant, and both of which were commenced by the said plaintiff for the recovery of the sum of money in the said promissory note specified, and which the plaintiff then claimed to be due to him as indorsee thereof; and such proceedings were thereupon had in both the said actions, that a question then arose and was depending, whether the defendant and the said *John Gaitt*, or either of them, was or was not liable to pay the sum of money in the said promissory note specified to the plaintiff. And the defendant further says, that long before the making and accepting of either of the said bills of exchange, to wit, on &c., certain disputes had arisen and were then depending between the plaintiff and

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Mary Ann Bingley, as administratrix of *Richard Bingley*, deceased, concerning a certain other sum of 300*l.*, which the plaintiff claimed to be due to him from the said *M. A. Bingley*, as such administratrix as aforesaid, upon and by virtue of a certain other promissory note, of which the plaintiff was then the holder and indorsee, theretofore, to wit, on &c., made by the said *R. Bingley*, deceased, by which he promised to pay on demand, to one *George Wyatt*, or order, 300*l.* for value received, with interest, &c.: and afterwards, and at the time of making the said bills of exchange, and before the commencement of this suit, to wit, on the 29th of *December*, 1834, the plaintiff was about to bring a certain action at law against the said *M. A. Bingley*, as administratrix as aforesaid, to recover the said sum of money in the said last-mentioned promissory note specified (a). And the defendant further says, that afterwards, and before the making of the said bills of exchange, and before the commencement of this suit, to wit, on &c., the defendant was indebted to *W. C.*, *R. M.*, and *J. F. G.*, as assignees of the estate and effects of the said *Wyatt & Thompson*, then being bankrupts, in a certain large sum of money, to wit, the sum of 117*l.* 6*s.* 6*d.*, if the defendant and the said *J. Gaitt* were discharged from all liability to the plaintiff upon the said promissory note so by them made as aforesaid. And afterwards, and before &c., for settling the said actions so as aforesaid depending between the plaintiff and the said *J. Gaitt*, and between the plaintiff and the defendant, it was agreed by and between the plaintiff on the one part, and the defendant on the other part, that the plaintiff should not proceed further in the said actions, or either of them, and that the defendant should pay to *G. S.*, then being the attorney of the plaintiff in the said actions, the costs incurred by the plaintiff in the prosecution of the same re—

(a) See the case of *Adams v. Bingley*, ante, p. 192.

spectively; and that the plaintiff should make and draw his three several bills of exchange upon the defendant, each for the payment of 45*l.*, one at six months, another at twelve months, and the third at eighteen months, after the dates thereof respectively, and which the defendant should then accept and deliver to the plaintiff; and that the defendant should pay to the plaintiff the said sum of 117*l.* 6*s.* 6*d.* so due to the said C., M., and G., as such assignees as aforesaid, if the defendant or the said J. Gaith were not liable to pay to the plaintiff the said sum of money specified in the said promissory note so made by them as aforesaid; and that the plaintiff should indemnify the defendant from all claims and demands, action and actions, which the said assignees might have upon the defendant in respect of the said sum of 117*l.* 6*s.* 6*d.*; and that upon payment of the said costs, and of the said sum of 117*l.* 6*s.* 6*d.*, and upon the defendant accepting the said bills of exchange so to be drawn by the plaintiff upon and accepted by the defendant as aforesaid, he the defendant and the said J. Gaith should be discharged from all liability to the plaintiff upon the said promissory note so made by them as aforesaid, if the plaintiff should recover in the said action so about to be commenced by him against the said M. A. Bingley, as such administratrix as aforesaid; and that until the plaintiff should so recover, or if he should not so recover, in such action, he the plaintiff should not require the defendant to pay any or either of the said three several bills of exchange so to be made and drawn by the plaintiff upon and accepted by defendant as aforesaid. The plea then alleged that the defendant paid the costs of the actions against him and Gaith, and the said sum of 117*l.* 6*s.* 6*d.*, and accepted and delivered to the plaintiff the three bills drawn on him pursuant to the agreement; that the plaintiff afterwards commenced the action against M. A. Bingley, which was still pending and undetermined, and that the plaintiff had not

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as yet recovered against the said *M. A. Bingley* in such action; and that the bills in the declaration mentioned are two of the bills so drawn by the plaintiff upon and accepted by the defendant.

Special demurrer, assigning for causes, that the plea did not allege the agreement therein mentioned to have been in writing; and that the defendant by his said plea alleged a contract differing from and inconsistent with the contracts contained in the bills of exchange in the declaration mentioned, and sought by such contract, so differing and being so inconsistent, to control, vary, and alter the contracts contained in such bills of exchange, and yet did not allege or shew such contract to have been in writing. Joinder in demurrer.

Chandless, in support of the demurrer.—The substance of this plea is, that the bills were accepted on an agreement to be paid on a contingency. Now, in the first place, it is requisite in such a plea, that the defendant should negative that there is any *other* consideration or contract on which he may be liable. Here there is a statement that the bills were accepted on the consideration and in the course of the transaction set forth; but the plea does not go on to allege that that was the sole consideration for the acceptance. The same objection was taken in *Davis v. Holding (a)*, but did not prevail there, on the ground that the agreement being *illegal*, it avoided the acceptance given by the defendant, whether it was the whole or a part only of the consideration for giving it.

Secondly, the plea is bad, on the ground that the agreement is not alleged to have been in writing. If, notwithstanding the statement of the defendant, a state of things can exist under which he can be liable, his plea is insufficient. Now, a written contract cannot be varied by a

(a) Ante, p. 159.

contemporaneous oral contract. It ought, therefore, to have been shewn that this contract, whereby the defendant seeks to vary the absolute engagement in the bills, was in writing. [Lord *Abinger*, C. B.—You do not vary the terms of a contract by making another collateral one.] This is stated to be a part of the same negotiation and proceedings on which the bills were given; it is a mere modification of the contract expressed in them. *Foster v. Jolly* (a) is a direct authority against the defendant. And there is a distinction as to this point between a declaration and a plea: though the former need not expressly shew the contract to be in writing, the latter must: *Case v. Barber* (b). In *Whittaker v. Mason* (c), it was admitted, that if the declaration stated a written contract, a plea which sought to introduce a contract in qualification of it, ought to shew that that was in writing also.

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Tyndale, contra.—There is an express allegation in the plea that the bills declared on are two of those given in pursuance of the agreement mentioned in the plea: that sufficiently shews that they were given for the consideration alleged—that their existence grew out of that agreement. On the other point, *Goss v. Lord Nugent* (d) is an authority to shew that a written contract, at any time before breach of it, *may* be varied or qualified by a new agreement, not in writing. [Parke, B.—But here you set up a *contemporaneous* parol contract.] It is not an agreement to prolong the term of payment, but to dissolve the contract altogether in a particular event. [Parke, B.—It is in effect an agreement to postpone payment until after the decision in *Adams v. Bingley*.] It was supposed that that case would have been decided long before the

(a) 1 C. M. & R. 703.

(b) T. Raym. 450.

(c) 2 Bing. N. C. 359.

(d) 5 B. & Adol. 58; 2 Nev. & M. 28.

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bills fell due. In *Alexander v. Gardner* (a), also, the doctrine was recognised, that a condition in a written contract, not under seal, might be waived by parol. [*Parke, B.*—At present it is enough to say that you seek, by a parol contemporaneous engagement, to alter the absolute engagement entered into by the bills.]

Lord ABINGER, C. B.—The proper course would have been to put the bills into the hands of a third person, to hold for you till the determination of the other case. It would be very dangerous to allow a party to alter, in such a manner, the absolute contract on the face of a bill of exchange. The effect of the cases is, that you are estopped from saying that you made any other contract than the absolute one on the face of the bills. A contract which seeks, by subsequent oral matter, to discharge altogether the contract created by the bill, and create a new one, is wholly different, and may no doubt be given in evidence: it is consistent with the bill; but this is a contract inconsistent with the bill. Our judgment must be for the plaintiff.

The other Barons concurred.

Judgment for the plaintiff.

(a) 1 Bing. N. C. 671; 1 Scott, 281.

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ASSUMPSIT on a charterparty, dated 24th of *September*, 1833, on the ship *Margaret Thompson*, whereby it was agreed that the said ship, then lying in the port of *Hamburgh*, and being tight, staunch, and strong, and every way fitted for the voyage, should, in the course of *November* then next, set sail and proceed to *Valparaiso*, the intermediate ports, and *Lima*; and, having discharged her outward cargo, should forthwith be made ready and proceed to *Costa Rica*, and there receive and take on board a full cargo of wood or other lawful produce &c.; and, being so loaded, should therewith proceed to *Liverpool*, and there deliver the same agreeably to bills of lading, and so end the voyage, &c. [The other stipulations of the charterparty are not material to be stated.] The declaration averred mutual promises, and alleged the following breaches:—that the vessel did not in the course of the said month of *November* set sail or proceed on her said voyage; that she was not in the said month of *November*, or at any time afterwards until she sailed on the said voyage, nor was she when she so sailed, to wit, on the 20th of *December*, 1833, tight, staunch, or strong, or in any way fitted for the said voyage; and that although she did, to wit, on the day and year last aforesaid, sail

In a declaration on a charterparty, by which the ship was to sail from *Hamburgh*, being tight, staunch, strong, and every way fitted for the voyage, in the course of the next *November*, and proceed to *Lima*, and having discharged her outward cargo, forthwith to be made ready, and proceed to *Costa Rica*, and there take on board a cargo, and then proceed to *Liverpool*,—breaches were alleged as follows:—That the vessel was not in *November*, or afterwards, until or when she sailed, to wit, on the 20th of *December*, tight, staunch, strong, or in any way fitted for the voyage;

and that though she did then sail from *Hamburgh*, yet by reason of her not being tight, &c., when she so sailed, she was obliged to, and did, put back into *Altona*, and was detained there for a long time, to wit, until, &c.; though she did then again set sail on her voyage from *Altona*, she did not proceed on the voyage according to its due course, or with proper dispatch, but was unnecessarily delayed, and deviated, &c., &c.; by means of which several premises the vessel did not arrive at *Lima* until &c., and the plaintiff lost the benefit of a homeward cargo from *Costa Rica*, &c. The defendant pleaded, (amongst other things,) as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into *Altona*, and being detained there for such time as was necessary to put further ballast on board, payment into Court of 1*s.*, and no damages *ultra*; and as to so much as related to her being detained at *Altona* beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, &c., *modo et forma*:—*Held*, on special demurrer, that the latter plea was bad, as answering only a part of the breach to which it applied, *viz.* the detention at *Altona*, and the subsequent delay and deviation; even if that *was* a breach, and was not merely a statement of special damage.

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and proceed on the said voyage, to wit, from the port of *Hamburgh* aforesaid, yet by reason of her not being tight, staunch, strong, and fitted for the voyage as aforesaid, when she so sailed, she was afterwards, to wit, on the day and year aforesaid, obliged to put back, and did put back to *Altona*, and was by reason thereof detained there for a long time, to wit, until the 30th of *January*, 1834; and although she did, to wit, on the day and year last aforesaid, again set sail and depart on her said voyage, to wit, from *Altona* aforesaid, yet she did not proceed on the said voyage in and according to the due course thereof, nor with the dispatch which she ought to have used according to the said charterparty, but after her said departure from *Altona*, and before her arrival at *Lima*, she was by and through her master and mariners, and by and through other the servants of the defendant, greatly delayed on her said voyage, and unnecessarily and improperly deviated from the same, and from and out of the course thereof, and went to divers other ports and places not in the course of the said voyage, and for purposes other than the purposes of the said voyage. By means of which said several premises the plaintiff saith that the said vessel did not arrive at the port of *Lima* aforesaid until the 11th day of *September*, 1834, and the plaintiff was hindered and prevented from loading and shipping on and by the said vessel, a certain cargo, and divers great quantities of goods &c., from *Costa Rica* aforesaid, and lost the benefit of a certain other charterparty which he had entered into at *Lima*, before the arrival of the vessel there, and while she was expected to arrive there in a reasonable time, and which was to be void if she did not arrive at the port of *Lima* by the 30th of *June*, 1834, &c. &c.

The defendant pleaded, *first*, as to so much of the declaration as related to the vessel not setting sail in the month of *November*, that she was prevented from so doing by the dangers of the seas and navigation: concluding to

the country. *Secondly*, as to the same breach, that the vessel was prevented from setting sail by the act of God, and by violent and tempestuous weather, and adverse winds; concluding with a verification. *Thirdly*, as to so much of the declaration as related to the vessel not being tight, staunch, and strong, that she was tight, staunch, and strong; concluding to the country. *Fourthly*, as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back and go to *Altona*, and being detained there for a short time, that is to say, such time as was necessary and required to put a further quantity of ballast on board, payment into Court of 1s., with an averment that the plaintiff had not sustained damages to a greater amount in respect of the cause of action in that plea mentioned. *Fifthly*, as to so much of the declaration as related to the vessel being detained at *Altona* beyond the time necessary and required to put the said ballast on board, that she was not detained there by reason of her not being tight, staunch, and strong, and every way fitted for the said voyage, in manner and form &c.; concluding to the country. And the *sixth* and *seventh* pleas denied the delay and deviation alleged to have taken place after the departure of the vessel from *Altona*.

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The plaintiff took issue on all the pleas except the fifth, and demurred specially to that plea; assigning the following causes, amongst others:—that the defendant, in and by the said fifth plea, denies and traverses matter which is not traversable, and which is only special damage; and that he also traverses and denies what is not alleged in the declaration, namely, the fact of the said vessel being detained at *Altona* beyond the time necessary and required to put the said ballast on board, by reason of her not being tight, staunch, and strong, and every way fitted for the voyage: and that the plea admits the breach alleged in the declaration, as to the ship not being tight,

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&c., and gives no answer thereto; &c. &c. Joinder in demurrer.

Crompton, in support of the demurrer.—One objection to this plea is, that it traverses only the *special damage* alleged in the declaration. The plaintiff complains that the vessel was not, as it was contracted she should be, tight, staunch, strong, and in every way fitted for the voyage: then he proceeds to shew the damage that resulted therefrom, *viz.* her being obliged to put back to *Altona*, and being detained there till the 20th of *January*; there is then further special damage alleged, *viz.* her delay and deviation in the subsequent part of the voyage, which the plaintiff ascribes to her being obliged to put back into *Altona*. Now all that the plea professes to answer is *part* of the detention at *Altona*. If the defendant had traversed the breach itself, *viz.* the not being tight, staunch, &c., he needed not have gone on to traverse the detention at *Altona*: on the other hand, if he is to negative the result of the breach, he ought to have gone on and negatived the whole of it—all the subsequent delay and deviation, which is equally damage resulting from the same alleged cause. If he means to say that the plaintiff is not damaged beyond 1s. in respect of this breach, he ought to have pleaded that to the whole breach. In trespass, that which comes after the *ita quod* is not traversable: *Com. Dig. Pleader*, C. 12. In *Smith v. Thomas* (a), a plea denying the existence of the special damage alleged in slander was held bad; and *Tindal*, C. J., says, “the plea must be an answer to the action; there is no such thing as a plea to the damages.” But the plea is also bad as traversing matter which is not alleged in the declaration. The plaintiff does not charge that the vessel was delayed at *Altona* beyond the time necessary to put ballast on board;

(a) 2 Bing. N. C. 372.

nor that she was delayed there by reason of her not being tight, staunch, &c., but by reason of her being obliged to put back. [*Parke, B.*—Her going into *Altona* could not be any reason for her staying there. The defendant, however, ought to have paid into Court all that he says was sufficient to cover all the damage arising from her not being tight, staunch, &c., which he admits; and should have gone down to trial on the issue, whether that was sufficient to cover all the damage resulting from that breach. *Alderson, B.*—The plea does not state that her whole detention there, which is fairly attributable to the breach of contract, is covered by 1s., but only a short period of it. Suppose the fact were, that she went into *Altona* by reason of her not having ballast, and while she was there a frost came on, which detained her a great while longer, on these pleadings the plaintiff could not recover in respect of that detention.] The Court then called on

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Martin, to support the plea.—The breach alleged is not the vessel's not being tight, staunch, &c., but her not proceeding on the voyage in due course. The plaintiff alleges, first, that by reason of her not being tight, &c., she was detained at *Altona*; and then, that after her departure thence, she was unnecessarily and improperly delayed, and deviated from the course of the voyage. The latter would appear to be clearly a distinct breach, founded on the contract to proceed on the voyage. Then, at the end of the declaration, the special damage resulting from all the premises is stated in the ordinary way; shewing that all which came before was matter of breach. The defendant is to answer the case as stated by the plaintiff. [*Parke, B.*—Even as you put it, you do not answer the latter of those breaches: and you limit the money paid into Court to a particular limited consequence of the former of them. You confess a part of the second breach, but

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do not avoid it—at least not in the legal sense; you do *avoid* it in the ordinary sense. But how can you say that what you call the third breach is a breach? It is no more than a consequence of the former. You had better amend.]

The Court accordingly gave the defendant

Leave to amend, on payment of costs.

M'GAHEY, Vestry Clerk of St. Pancras, Middlesex, v.
ALSTON and Another.

The subordinate officers appointed under the *St. Pancras Vestry Act*, 59 *Geo. 3*, c. 39, s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor (who are annual officers), under s. 57, continue in force after the directors to whom they were given have gone out of office.

DEBT on bond, dated 1st of *January*, 1834, given by the defendant to the directors of the poor of the parish of *St. Pancras*, and their successors, in the penal sum of 500*l.* The plea craved *oyer* of the bond and condition, which, after reciting that the defendant *Alston* had, in pursuance of the powers and authorities contained in an act of Parliament passed in the 59th year of the reign of King *Geo. 3*, intituled, “An Act for establishing a Select Vestry in the parish of *St. Pancras*, in the county of *Middlesex*, and for other purposes relating thereto,” been elected and appointed an officer or servant of the vestrymen and directors of the poor of the parish of *St. Pancras*, under the title and denomination of paying agent and accountant,—was for the faithful execution of such office, so that no loss or injury should be sustained by the vestrymen or directors, or their successors, or by the parishioners, and for the faithful accounting upon oath at the weekly and other meetings of the directors, and their successors, and at all other times when required by the vestrymen and directors, for all monies received in the execution of the office, &c. &c.: and it provided also, that the defendant should, within ten days next after he should have been removed from or have quitted his said office,

make up his accounts, and pay over any balance in his hands to the treasurer or clerk of the vestrymen or directors for the time being, and deliver up his books and papers to the vestrymen or directors, or their successors, or their clerk or clerks for the time being, &c. The defendants then pleaded, that, at the time of the making of the said supposed writing obligatory, the said office of directors of the poor of the parish of St. *Pancras* was, and still is, an annual office; and that the office of the said directors who were in office at the time of the making of the said writing obligatory expired before the commencement of this suit, to wit, on the 31st of *March*, 1834; and that the defendant *Alston* did, after the making of the said writing obligatory, during the continuance in office of the said last-mentioned directors who were in office at the time of making of the said writing obligatory, to wit, from the time of making the same until the said 31st day of *March*, 1834, when the said last-mentioned directors went out of the said office, well and faithfully execute the said office of paying agent and accountant, in such manner that no loss, damage, or injury hath been or can be sustained by the said vestrymen of the said parish, or by the said directors or their successors, or by the said parishioners, &c. &c. [The plea then went on to aver performance, during the same period, in respect to all the other matters mentioned in the condition.]

General demurrer and joinder.

It was stated in the margin of the demurrer-book, that one point of law intended to be argued in support of the demurrer was, that the office of paying agent and accountant was not determined by the going out of office of the directors who were in office at the time when the bond was executed by the defendants.

Peacock, in support of the demurrer.—The office in question is not merely co-existent with that of the di-

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rectors, but is a continuing one. The question depends on the construction of the *St. Pancras Vestry Act*, 59 Geo. 3, c. xxxix. By the third section of that act, select vestrymen are appointed, not limited to any particular period of continuance in office. By s. 19, the vestrymen, or the major part of them, assembled at any of their meetings, are to appoint the several subordinate officers as they shall deem necessary for the purposes of the act, to direct such security to be taken for the due execution of the office as they shall think proper, and are empowered from time to time to remove all such officers "at the will and pleasure of them the said vestrymen," and to revoke, countermand, and vary their appointments. The defendant, therefore, was an officer appointed, not by the directors, but by the vestrymen, and his office was determinable at their pleasure. Then, by s. 41, the vestrymen are annually, in *Easter* week, to appoint from among themselves directors of the poor, to continue in office only for the term of one year, and until other directors are appointed in their room. Where, therefore, the offices were intended to be annual, the act has so expressly provided. It is true that, under s. 57, all bonds are to be given to the directors, as trustees of the parish; but that does not make the appointment theirs. [*Parke*, B.—The directors, then, as such, have nothing to do with the appointment, and must be taken to appoint only in their character of vestrymen.] The bond does not recite that the directors appointed, but only that the defendant was appointed "an officer or servant of the vestrymen *and* directors," which in some sense he is, since by s. 21 he is to account to the directors. On the whole, then, it is plain that this was an appointment by permanent officers for an unlimited time, and that there is nothing in the act which determined it on the going out of office of the existing directors. [*Lord Abinger*, C. B.—There is not a word said about the officers being annual.]

Tomlinson, contra.—In favour of a surety the Court will rather lean to the construction that the office and obligation are limited, if such construction can be reasonably collected from the act. By s. 19, the salaries are to be paid “yearly or otherwise.” By s. 21, the officers are monthly to account, and, within ten days after quitting their offices, to deliver up their books, &c., and pay over their balances, to the directors *for the time being*. That, and other provisions of the same kind where those words are introduced, appear to assume that the officers have gone out of office with the directors of the former year. By the terms of appointment, as recited in the bond, and the duties of the office as therein set forth, this officer appears to be the mere servant of the directors. But if he is the servant of the vestrymen *and directors*, when the existing directors cease to hold that office, an integral part of the entire body being gone, the obligation ceases. [Lord Abinger, C. B.—If he is appointed a week before the directors go out of office, does he go out at the end of the week?] The defendants must so contend. The word “successors” in the bond may be satisfied by the successors of such directors as may die or be removed within the year.

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LORD ABINGER, C. B.—Your case must depend on the words either of the bond or of the statute. It appears to me, that, though you are instructed to argue it, you cannot make a plausible argument upon either the one or the other. If every appointment is to be made over again at the end of every year, it would impose a most elaborate duty on the parish officers. The judgment must be for the plaintiff.

Judgment for the plaintiff.

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AUGERO v. KEEN and Another, Executors of GEORGE KEEN, deceased.

A bond given to secure the faithful performance of the office of a collector of parochial rates (who was by act of Parliament to be appointed by trustees for a year, and then to be capable of re-election) was conditioned, that, "from time to time, and at all times thereafter, during such time as he should continue in his *said* office, whether by virtue of his *said* appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the *said* trustees, or their successors, to be elected in the manner directed by the *said* act, he should use his best endeavours to collect the monies received by means of the rates, in the then present or in any subsequent year," &c., &c.: —*Held*, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.

THE plaintiff declared as clerk to the trustees for executing an act of Parliament of the 10 Geo. 4, (the *Lambeth* Watching and Lighting Act, 10 Geo. 4, c. cxxix), on a joint and several bond, dated the 10th *July*, 1830, given by the defendant's testator, together with *J. R. Pavey* and *W. Pugh*, to seven of the then trustees for putting the said act into execution, on behalf of themselves and the other trustees appointed by the act, in the penal sum of 400*l.*, to be paid to the said trustees thereinbefore named, or the survivor or survivors of them, or their or his attorney, executors, administrators, or assigns.

The plea craved *oyer* of the bond and of the condition. After reciting that, at a meeting of the trustees under the act, held on the 10th of *July*, 1830, the said *J. R. Pavey* having been required to give good and sufficient security, by entering into a bond with two sureties, in the penalty of 400*l.*, for the due execution of his said office, and for duly accounting for the monies to be collected and received by him therein, had agreed to give such security, and had accordingly, together with the said *W. Pugh* and *George Keen*, entered into the above bond or obligation; the condition was, that, if the said *Pavey* should, from time to time and at all times thereafter during such time as he should continue in his *said office* of collector, whether by virtue of his aforesaid appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority or with the consent or acquiescence of the said trustees, or their successors, to

be elected in the manner directed by the said act, or any seven or more of them, duly, attentively, and faithfully execute and perform the said office, and use his best endeavours to collect, get in, recover, and receive, the rates and assessments which should or might at any time or times thereafter, during the then present or in any subsequent year, be made under or by virtue of the said act of Parliament, &c., &c., (there were various stipulations for the faithful performance of the office, payment over of money, &c.) the bond should be void, or otherwise should remain in full force and virtue. The plea then alleged, that the said office of collector in the condition mentioned was the office of collector of the rates and assessments constituted and mentioned in and by the said act of Parliament; that, after the making of the act, and before the making of the said writing obligatory, to wit, on the 1st of *July*, 1833, the said trustees, by writing under their hands, in manner and according to the provisions of the act, did appoint the said *Pavey* to the said office of collector in the condition mentioned, and under and by virtue of that appointment he did remain and continue in the said office until and upon a certain day, to wit, until and upon the 10th day of *July*, 1834, being the next meeting of the said trustees after the annual day of election of such trustees, as in the said act mentioned, when the said office, and duties and employment of the said *Pavey* therein, ceased and determined. The plea then went on to allege performance of all the terms of the condition, "during the said term that he the said *Pavey* remained in the said office of collector as aforesaid."

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Replication, that, after the said *Pavey* had been so appointed to the said office of collector as in the plea mentioned, and after the making of the said writing obligatory, and after the first year of his employment and duties

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in the said office had ceased and determined, and before the commencement of this suit, to wit, on the 9th of *July*, 1834, the said trustees, at a meeting then duly held in pursuance of the said act of Parliament, did, by writing under their hands, in the manner and according to the provisions mentioned and contained in the said act of Parliament, re-elect and re-appoint the said *Pavey* to the said office of collector in the said condition mentioned, and the said *Pavey* did then accept the said office in pursuance of such re-appointment, and continued to be and was retained and employed as such collector, by the authority and with the consent and acquiescence of the said trustees, from the time of his said re-appointment until the 10th day of *June*, 1835. The replication then alleged, that, after his re-appointment, and while he held the said office, and was so retained and employed therein as aforesaid, to wit, on the 11th of *July*, 1834, and on divers other days and times between that day and the time when he finally ceased to be employed as such collector after the said re-appointment, he committed breaches of the condition, by not paying over divers monies collected on account of the rates.

To this replication there was a special demurrer, assigning various causes, which, however, were abandoned on argument; the following ground of demurrer was also stated in the margin:—that the obligation of the bond only extends to the faithful performance by *Pavey* for one year. Joinder in demurrer.

W. H. Watson, in support of the demurrer.—This was an obligation which was fully performed when the said office to which *Pavey* was originally elected and appointed ceased and determined, viz. on the 10th of *July*, 1834. By the 13th section of the act, the trustees are empowered to appoint the officers, and it is provided that they shall hold their offices and appointments no longer than until the next

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meeting of the trustees after the next annual day of election of trustees, at which, or at any subsequent meeting, they shall respectively be capable of being *re-elected*. [*Parke, B.*—How do you get over the words of the condition, “by virtue of his aforesaid appointment, or of any re-appointment thereto?”] They may be satisfied by applying them to the case of a re-appointment in consequence of an invalidity in the original appointment. The argument on the other side must go to this extent, that, if the office were vacant for a year, and the party were then appointed again, the obligation would attach. [*Alderson, B.*—That would be a fresh appointment, not a re-appointment. *Parke, B.*—The words of the condition are, “if he should, during such time as he should continue in his said office, &c.” *Lord Abinger, C. B.*—If the words were, “by virtue of any *resumption of* or re-appointment to his office,” there might be something in your argument.] Wherever the office is an annual one, to make the bond a continuing obligation, there ought to be words clearly and without doubt pointing to its continuance beyond the year. Much importance has always been attached to the words, “said office,” and limitations of similar import. In *The Liverpool Waterworks Company v. Atkinson (a)*, where the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, with a stipulation that “at all times thereafter, during the continuance of *such his employment*, and for so long as he should continue to be employed,” he would use all diligence in collecting all rents &c. which should *annually grow due* to the company, and justly account, &c., the obligation was held to be limited to the twelve months. *Lord Ellenborough* lays all the stress of the case on the words, “said office,” and “such his employment,” as being words of reference, and incorporating all the terms to

(a) 6 East, 507.

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which they bore reference. And *Le Blanc*, J., says, “the subsequent stipulations by the defendant to account, &c., during the continuance of his employment, &c., refer to the original employment in point of time.” In *Hassell v. Long* (a), a bond conditioned for the due payment of monies by a collector of land-tax was held to be confined to the current year in which he was, at the date of the bond, collector, though it did not appear on the condition that he was appointed for a year only; it being shewn by the plea that the office was an annual one, although it also appeared by the replication that he continued to hold it for many years. *Peppin v. Cooper* (b) is to the same effect. [Lord *Abinger*, C. B.—It is not disputed that something must appear on the face of the bond, to shew that it applies to a continuance in office beyond the year; it is for you to make out that that is not shewn on this bond. *Bolland*, B.—The words “said office” are merely descriptive. *Parke*, B.—To found your argument, you must strike out altogether the words “or in any subsequent year.”] They are not stronger than the word *annually*, in *Liverpool Waterworks Company v. Atkinson*. [*Parke*, B.—Those words furnish a construction for the word “re-appointment;” it is clear it means a re-appointment in any subsequent year. *Alderson*, B.—The construction you contend for must also reject the word *successors*, “to be elected in manner directed by the act,” which must therefore be in subsequent years.] If the words “in any subsequent year” conflict with the words “said office,” they ought to be rejected, unless they be applied to the two years 1833 and 1834, into both of which the first appointment extended. [Lord *Abinger*, C. B.—The words “said office” respect its nature, not its duration.] Again, the office is one not only of appointment, but of election also; if the bond was to

(a) 2 M. & Sel. 363.

(b) 2 B. & Ald. 431.

extend to several years, it should have also said, "by virtue of any *re-election*." *Exch. of Pleas,*
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LORD ABINGER, C. B.—It would be difficult to find any words more clear than those employed in this case, to shew that the parties meant to provide for the continuance of the party in office. In order to save expense, as long as he continues in office under his original appointment, or any continuing re-appointment, only one bond is to be required.

PARKE, B.—I entertain not the slightest doubt in this case. The bond applies to all future years during which the party is continuously re-appointed. Whether it applies to a case in which there is a chasm in the office, and then he is re-appointed, we are not called upon to say.

BOLLAND and ALDERSON, Bs., concurred.

Jndgment for the plaintiff.

R. Hayes appeared to argue for the plaintiff.

GRAHAM v. PARTRIDGE.

May 5th.

DEBT for goods sold, &c. Plea, *nunquam indebitatus*, with notice of set-off. At the trial before Lord Abinger, C. B., at the last assizes for the county of *Warwick*, the defendant proposed to give evidence of the set-off, but the Lord Chief Baron was of opinion that it was inadmissible, and that the set-off ought to have been pleaded; and the jury found a verdict for the plaintiff.

A defendant is not entitled to give evidence of a set-off under a notice of set-off delivered with the plea of *nunquam indebitatus*, since the rules of *Hilary Term, 4 Will. 4*; and the Judges were not restrained by the proviso in the 3 & 4

Humfrey, on an early day in this term, moved for a *Will. 4, c. 42, s. 1*, from making the rule of *Hilary Term 4 Will. 4*, requiring that, in all cases, a set-off shall be pleaded.

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rule to shew cause why there should not be a new trial, on the ground that the evidence was improperly rejected. He admitted that, according to the rule of *Hilary Term, 4 Will. 4*, the set-off ought to have been pleaded; but he submitted that this case fell within the proviso in the *3 & 4 Will. 4, c. 42, s. 1*, which restrains the Judges from "making any rule or order which shall have the effect of depriving any person of the power of pleading the general issue and giving the special matter in evidence, in any case wherein he now is, or hereafter shall be entitled to do so, by virtue of any act of Parliament now or hereafter to be in force." A rule having been granted,

Goulburn, Serjt., and *Hayes*, now shewed cause. The set-off ought to have been specially pleaded. It is clear the Judges have thought that they had power to make the rule in question, for the case of set-off is expressly mentioned in it; and in *Fidgett v. Penny (a)*, *Alderson*, B., expressly stated that a set-off must be specially pleaded. But it is said, that they had no jurisdiction, in consequence of the proviso in the first section of the statute *3 & 4 Will. 4, c. 42*. But that does not apply to the present case; that proviso was intended to meet the cases of actions against justices, constables, excise and custom-house officers, landlords distraining, persons acting under the authority of acts of Parliament, and other particular classes of persons to whom the legislature has at various times given the privilege of giving in evidence under the general issue matters which, in ordinary cases, should have been specially pleaded. But the defence of set-off is open to all defendants, and was evidently not contemplated by the legislature, for there is no more reason for favouring this defence than any other defence in confession and avoidance. The intention of

(a) 1 C. M. & R. 110.

the statute, therefore, seems to exclude this case; and the words of the clause are also opposed to the construction contended for on the other side. The language of the proviso can only be applied to those cases in which a defendant is expressly enabled by some statute to give in evidence under the general issue, matters which, according to the general rules of pleading, ought to form the subject of a special issue. This is clear from the words, "pleading the general issue, and giving *the special matter* in evidence." It is said that the statute of set-off enabled defendants to give the defence of set-off in evidence under the general issue, instead of pleading it specially. But that is not so; the words of the statute, 2 Geo. 2, c. 22, s. 13, which first gave this defence, are, that, where there are mutual debts, "one bill may be set off against another; and such matter may be given in evidence under the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, notice shall be given, &c." The object and effect of the statute of set-off were, not to relax the rules of pleading, but to introduce a new defence; and the only alteration it made in the principles of pleading was, to require that, in all cases, a defendant should have notice of cross-demands. The words, "as the nature of the case shall require," shew that, subject to the subsequent provision as to giving notice, the statute meant to leave the rules of pleading as they were when the act passed. And, according to the principles of pleading then in operation, the new defence in confession and avoidance given by the statute of set-off would have been admissible under the general issue *nil debit* in debt on simple contract, or under *non-assumpsit* in *assumpsit*; for, in the former case, the effect of the defence was to destroy the existing debt, and, in the latter, the existing liability, which formed the consideration for the implied promise declared on. But, in covenant, or debt on specialty (the only other forms of action in which

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the defence of set-off could arise), where the plea of *non est factum* was quite inapplicable to a defence in confession and avoidance, a special plea of set-off would have been necessary, as in all other defences in confession and avoidance. The statute did not mean to alter the rules of pleading, except by requiring that, in cases where, according to the ordinary rules, a set-off would have been admissible under the general issue, notice should be given; so that, with regard to the forms of pleading, it was restrictive rather than enabling. In *Oldenshaw v. Thompson* (a), it was held that a set-off was not admissible under the plea of *non est factum* in covenant; and *Bayley, J.*, particularly adverts to the language of the plea, as being inapplicable to the defence of set-off.

The statute of set-off cannot, therefore, be considered as having introduced any relaxation of the rules of pleading; and if so, the defence is not within the proviso of the 3 & 4 *Will.* 4, c. 42, s. 1. But, secondly, even if that proviso applied to the defence of set-off, the defendant could not be entitled to give evidence of a set-off under the present plea, for he has not pleaded *nil debet*, but has adopted the form of *nunquam indebitatus* given by the new rules, which is just as inapplicable to the defence of set-off as the plea of *non est factum* in covenant. If the defendant had intended to raise the question as to the power of the Judges to alter the rules of pleading, with regard to set-off, he should have pleaded *nil debet*, and then have contended that the Judges had no power to deprive him of the right of pleading this plea. The plea that the defendant never was indebted, was certainly not the general issue contemplated by the statutes of set-off. The Court then called upon—

Gale, to support the rule.—This case comes within the proviso in the 3 & 4 *Will.* 4, c. 42, s. 1, and the Judges had,

(a) 5 M. & Selw. 164.

therefore, no authority to make the rule in question, as regards the plea of set-off. If the words in the statute of set-off be construed together, it will appear that this defence is given by that statute, and that it may be taken advantage of, either by pleading it, or by a notice accompanying the general issue. It is similar to the provision in the Bankrupt Act, which requires a party to give a notice, if he intends to dispute any part of the bankruptcy. It is a defence given by a statutory enactment, and it may be given in evidence under the general issue by force of the statute of set-off. With regard to the argument that this plea is not a general issue, it is provided by the rule, *Hilary Term, 4 Will. 4, Covenant and Debt, 3*, that the plea of *nunquam indebitatus* “shall have the same operation as the plea of *non-assumpsit* in *indebitatus assumpsit*.” It is, therefore, to be treated as the general issue.

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LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged. The question on the statute of set-off is of importance. I thought at the trial that this defence must be specially pleaded, and I thought so from the language of the new rules. But there might be some doubt whether the Judges had any authority to make the rule they did on this subject, because it was said that this defence was permitted to be given in evidence under the general issue by the statute of set-off, 2 *Geo. 2, c. 22, s. 13*, and therefore the case came within the proviso of the 3 & 4 *Will. 4, c. 42, s. 1*. I thought, indeed, that the intention of that proviso was to apply to cases where a party acts in a public capacity, and to except out of the power of the Judges those cases in which the legislature have afforded protection to magistrates, constables, and other persons acting in the discharge of public duties, and those in which a privilege is granted to some particular indi-

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viduals. It is obvious that these cases are distinguishable from the present defence under the statute of set-off, which applies generally to all the King's subjects. But, whatever argument might have been drawn from the language of the statute, an answer has been given to it by Mr. *Hayes*. The statute of set-off does not propose to alter the common-law mode of pleading, but merely provides that a party may use this as a defence. If, in an action of *assumpsit* or debt, it might be given in evidence under the plea of the general issue, in other actions it must have been pleaded specially. The statute goes on to provide, that, at the time of pleading the general issue, notice shall be given of the particular debt intended to be insisted on, otherwise such matter shall not be allowed to be given in evidence. This provision has been properly observed to have been a restriction, and not a privilege. I am of opinion, therefore, that the plea of set-off does not fall within the intention of the legislature, in the proviso contained in the statute of 3 & 4 *Will.* 4, c. 42, s. 1; and that the Judges did not exceed the powers given to them by that statute, in making the rule in question.

PARKE, B.—I think the ruling of the Lord Chief Baron in this case was perfectly correct, that the new rules have full effect, and that the Judges were not restrained from making the rule in question by the proviso. Certainly the fifteen Judges who framed the rules had no idea that the statute intended to restrain them from making that regulation. Still they may have been mistaken in that respect, and we are called upon to determine whether they were authorized or not. I am happy that I have been enabled, by the ingenious argument of Mr. *Hayes*, to say that they were. The clause was intended to protect persons in public situations, but it was not meant to

apply to cases of private individuals. The proviso is as follows:—"Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of Parliament now or hereafter to be in force." No act of Parliament, strictly speaking, enables a person to plead the general issue; he has that right at common law, but the statutes referred to enable a person to give in evidence under that plea, what would not otherwise be admissible under it. Now, if we look at the statute of set-off, we shall see that it does not make that defence evidence under the general issue. The legislature constituted it a defence, and from that instant it became a defence under the general issue. The statute, however, restricted that defence, by requiring a notice to be given before the evidence should be admitted. It seems to me also that there is weight in the argument that this is not a plea of the general issue which ought to have been pleaded with the notice of set-off; and that, as it is contended that the Judges were prevented by the proviso from making the rule on this subject, the defendant ought to have pleaded *nil debet*, and not the present plea. The notice was therefore wholly inoperative.

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BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

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DOE d. NASH v. BIRCH.

Ejectment for a forfeiture. *A.*, by an agreement in writing, let to *B.* a house at the rent of 60*l.* a year, to be paid quarterly; and *B.* agreed, within three calendar months, to erect a shop-front, and otherwise repair, paint, paper, and white-wash the house. And it was further agreed, that, if *B.* did not erect the shop-front within three months, it should be lawful for *A.* or his agents to re-take possession of the premises, and the agreement should be null and void. *B.* continued in the possession of the premises, and enlarged the window, but, as the plaintiff

contended, did not erect a *shop-front*. It appeared also, that, after a quarter's rent had become due, and after the expiration of three months from the date of the agreement, *A.*'s son, the father being too ill to attend to business, made a demand of a quarter's rent, which *B.* offered to pay, if he would indemnify him for a sum which he had paid as a penalty to *A.*'s lessor for carrying on a trade in the premises, which was refused. At the trial, *B.*, the defendant, contended that he had made a shop-front which answered the purposes of his trade; and he offered to shew that *A.* held the premises under a lease from *C.*, which contained a clause imposing a penalty upon the lessee, if he allowed a trade to be carried on upon the premises; from which it was to be inferred that the words *shop-front*, in the agreement, were used in a peculiar sense; but this evidence was rejected:—*Held*, that such evidence was clearly inadmissible to explain the meaning of the words *shop-front*, in the agreement.

Held, also, it not having been proved that *A.* himself had had any notice of the nature of the alterations, that the son had not sufficient authority to waive the forfeiture.

Quære, whether the demand of rent which became due subsequent to a forfeiture, amounts to a waiver of the forfeiture.

Held, also, that the proviso in the agreement, that it should become "null and void," made it a lease voidable only at the election of the lessor.

EJECTMENT to recover a house and premises in *Crawford Street*, in the parish of *St. Mary-le-bone*, in the county of *Middlesex*. The cause was tried before Lord *Abinger*, C. B., at the *Middlesex* Sittings after last *Michaelmas* Term, when it appeared that the lessor of the plaintiff was the lessee of the premises in question under Mr. *Portman*, for a long term, and that the defendant had agreed with one *George Chowles*, the agent of the lessor of the plaintiff, for a lease of the premises in question, which was then a private house, for the purpose of opening it as an eating-house and beer-shop. By that agreement, which was dated the 1st of *June*, 1835, and made between the said *George Chowles* and *Richard Birch*, the defendant, in consideration of the sum of 60*l.* *per annum*, to be paid quarterly, the said *George Chowles* agreed to let the said *R. Birch* the premises in question, on lease for seven, fourteen, or twenty-one years, determinable at the end of each separate term at the option of the said *R. Birch*; and the said *R. Birch* agreed to take the premises, and to pay the yearly sum of 60*l.*, in four equal payments, on the usual days of pay-

ment. And the defendant further agreed, that he would, at his own expense, and within three calendar months, erect a shop-front, and otherwise repair, paint, paper, and white-wash the whole of the house, and so keep the same in good repair during the whole term, and at the end of either of the said terms deliver it up in good ten-antable repair. And the said *G. Chowles*, for the said *John Nash*, did agree, that on the shop-front being erected, and the said house and premises being put into good and sufficient repair, the said *J. Nash* should execute the said lease, bearing date *Midsummer*, 1835, from which time the rent was to commence, at the expense of the defendant. And it was further agreed between the parties, that in case the defendant did not erect the shop-front, and otherwise repair the premises, within three calendar months from the date of the agreement, it should be lawful for the said *J. Nash*, or his agents, to re-take possession of the premises, and the agreement should be null and void. And the defendant further agreed, that in case he did not fulfil his engagements at the time specified, he would forfeit and bind himself to pay the sum of 20*l.* to the said *J. Nash*, over and above the rent that might be due for the premises at that time. The defendant entered under this agreement, and made some alterations in the premises, and enlarged the window, but did not make a bow window; and the lessor of the plaintiff insisted, that the defendant had not erected a shop-front, according to the technical meaning of the agreement; and this ejectment was brought to recover possession of the premises. At the trial, the defendant contended that he had made a shop-front which answered the purposes of his own trade; and he offered to shew, that the lessor of the plaintiff held the premises under a lease from *Mr. Portman*, which contained a clause imposing a penalty upon the lessee, if he allowed a trade to be carried on upon the premises without the licence of

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the lessor; and that Mr. *Portman* had distrained upon the premises for that rent, which he had accordingly paid. The Lord Chief Baron, however, was of opinion that this evidence was not admissible, and refused to receive it. The defendant then insisted that there had been a waiver of the forfeiture, and the son of the lessor of the plaintiff was called, who proved, that, in consequence of his father's illness, he had acted as agent for his father; that he had from time to time seen the alterations which were made, and had made no objection. He proved also, that on the 8th of *July*, 1835, he had sent the following notice to the defendant:—

“Whereas, in the indenture of lease, under which the messuage, or tenement and premises, now numbered 119, in *Crawford Street*, in the parish of *St. Mary-le-bone*, in the county of *Middlesex*, are held, which said premises you now hold under an agreement for a lease, bearing date the 1st day of *June*, 1835, there is contained in such lease, a covenant not to use the said messuage or tenement and premises for the trade of a victualler, or as a public-house, or for a beer-shop, or coffee-shop, or for any other art, trade, or business whatsoever. I hereby, as the agent for *John Nash*, give you notice not to use the said messuage, or tenement and premises, for the said trade of a victualler, or as a public-house, or for a beer-shop, or coffee-shop, or for any other art, trade, or business whatsoever. And I hereby further give you notice, that you will be held responsible and liable for any damages or expenses the said *John Nash* may sustain, or be put to, by your committing a breach of the above-mentioned covenant.

John Nash.”

He also stated, that, a short time after *Michaelmas*, he had applied to the defendant, and made a demand of the rent due up to *Michaelmas* for the premises, and which the defendant offered to pay, provided he would give him an indemnity against Mr. *Portman's* demand; but which

he refused to give, and the defendant refused to pay the rent. He also admitted that this ejectment had been commenced upon his own authority, without any communication with his father, who was too ill to attend to business. The Lord Chief Baron was of opinion, that this did not amount to a waiver of the forfeiture; and he left it to the jury to say, whether the defendant had erected a shop-front according to the agreement. The jury having found a verdict for the plaintiff—

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Erle, in *Hilary* Term last, moved for a new trial, on two grounds: *first*, that the evidence tendered was admissible; and, *secondly*, that the plaintiff had waived the forfeiture. First, he contended, that the evidence was admissible to explain what the parties intended by the words “shop-front” in the agreement, because, if by the terms of the lease from the ground landlord, the carrying on a trade in a shop would create a forfeiture of the term, it might fairly be assumed that the meaning of the words used in the agreement was different from that which they purported to express. But the Court were clearly of opinion that the evidence was inadmissible for this purpose, Lord *Abinger*, C. B., observing, that it was a question whether, in construing a contract between *A.* and *B.*, you might call in aid a contract between *A.* and *C.*, to shew the meaning of the former contract. The Court, however, granted a rule to shew cause, on the ground of the waiver of the forfeiture; against which—

Bompas, Serjt., on a former day in this term, shewed cause.—*First*, the demand of rent was no waiver of the forfeiture, because, by the terms of the agreement, the lessor of the plaintiff had not only a right to enter, but the agreement was to be null and void. There is a distinction between this case and the case where there is a proviso for re-entering for breach of covenants, as there

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the lessor has an option to avoid the lease, or to waive the forfeiture. *Doe d. Brian v. Bancks* (a). But this cannot be waived, as it becomes null and void on the stipulation not being performed. It is in the nature of a condition precedent. [*Parke, B.*—You argue, that if it is to be absolutely void, the forfeiture cannot be waived; but the argument on the other side is, that there is no difference as to that, since the case of *Doe v. Bancks*. In that case the tenant wanted to shew that the lease was void by his own act, arguing that he might take advantage of his own wrong; but the Court held, that as long as the landlord chose to say it was not void, the tenant should not be allowed to say that it was.] But, *secondly*, even supposing that it was not null and void, unless the landlord chose to say so, the *demand* of rent alone does not amount to a waiver of the forfeiture. No case suggests that a demand of rent is sufficient. It is not an act which admits an existing tenancy. [*Parke, B.*—In *Green's* case (b), calling the party a tenant, in a receipt for by-gone rent, was held to be sufficient evidence of a waiver; and that though the receipt of the rent would not be a waiver, yet, that the calling him tenant in the receipt was. You may say, that a demand of rent is not a forfeiture, because the landlord in effect says, if you will pay me the rent, I will accept you as tenant, and the tenant does not do so; therefore it is incomplete: some distinct act ought to be done, to constitute a waiver.] All the cases where it has been held that acceptance of rent due subsequent to a forfeiture amounts to a waiver of the forfeiture, are cases where the individual act is not the act of one party only, but where one pays and the other receives the rent, and the tenant suffers a loss by the payment of the rent. The landlord, having gained an advantage by treating him as tenant, is not allowed afterwards to say that he is not

(a) 4 B. & Ald. 401.

(b) Cro. Eliz. 3.

tenant. *Thirdly*, the son had no sufficient agency to authorize him to waive the forfeiture. He was not his father's general agent, but merely acted for him whilst he was too ill to attend to business himself. The agent's knowledge of the forfeiture is not equal to the knowledge of the lessor, unless it is shewn that he has a general authority to do any thing with the property. If he has not the power to sell the estate, how can he have authority to do an act which deprives his principal of the estate? The son might have an authority to receive the rent, but it was an authority limited to that extent. [*Alderson*, B.—The receipt of rent, after a forfeiture, might make the party tenant from year to year against the lessor. By receiving the rent, the lessor is supposed to have said that he is tenant from year to year; he thereby becomes tenant from year to year. Lord *Abinger*, C. B.—The question which has been raised is, whether a demand of rent would create a tenancy from year to year? The Court is inclined to think that it would not.]

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Barstow, on a subsequent day, was heard in support of the rule.—As to the words, that the agreement shall be absolutely void, in addition to the case of *Doe v. Banks*, the subsequent case of *Arnsby v. Woodward* (a) is a decisive authority to shew, that where the words are like those in this agreement, the landlord may waive a forfeiture by the acceptance of rent accrued due subsequently to the forfeiture. Then, as to the authority of the son, he was the agent of his father, and had authority as such to bind his father by the demand of rent, which amounted to a waiver of the forfeiture. The evidence shews that he conducted the whole of his father's business, and it does not appear that there was any limit to his agency; and from his demand of the rent, it may fairly be presumed that he had authority to receive it.

(a) 6 B. & C. 519; 9 D. & R. 536.

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LORD ABINGER, C. B.—You have succeeded in shewing that, according to the authorities, your construction of the words “null and void,” in the agreement, is the correct one. But the Court think there is very great difficulty as to the question of the son’s agency, and we are of opinion that there is not sufficient evidence of his authority to waive the forfeiture.

PARKE, B.—The whole turns on the point, whether the son had authority to waive the forfeiture. It seems to me, that the son had probably an authority to receive the rent, but not to grant a new lease, by waiving the forfeiture of the former one. If it had been proved that the father had had notice of the alterations, and he had still allowed the son to receive the rent, the forfeiture might have been waived. But that was not proved, and the question of waiver does not therefore distinctly arise in this case. If it had, the authorities cited shew that this was a lease voidable at the election of the landlord. Then I think that an absolute, unqualified demand of the rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from *Croke’s Reports*.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

BRYANT *v.* CLUTTON.

A., being in the custody of the Marshal of the King’s Bench

prison, was brought up to that Court upon an order of the Court, and charged with an attachment for contempt: upon which attachment he was afterwards detained in custody:—*Held*, that trespass was maintainable against the party who caused the order to be served on the Marshal; *dissentiente* Lord Abinger, C. B.

TRESPASS for assaulting and imprisoning the plaintiff. Pleas, *first*, not guilty; *secondly*, a special plea justifying

the trespasses under an attachment issued out of the Court of *King's Bench*, for a contempt in non-payment of costs pursuant to the Master's *allocatur*. Replication, *de injuriâ*. At the trial before Lord *Abinger*, C. B., at the *Middlesex* Sittings after last *Michaelmas* Term, the plaintiff's counsel opened the following case:—That the plaintiff, being in the custody of the Marshal of the *King's Bench* prison, was brought up to that Court by an order obtained by the defendant, and served upon the gaoler by the defendant's clerk, the defendant being an attorney; that, on being brought up, he was committed by the Court to the same custody on an attachment for non-payment of costs, and was detained in prison thereon for the space of four years and a half. It appearing, in answer to an inquiry from the Lord Chief Baron, that it could not be shewn that the defendant had personally interfered in the imprisonment, he nonsuited the plaintiff, being of opinion that, under such circumstances, the defendant was not liable in trespass; and that, if any action were maintainable at all, it must have been an action on the case, provided malice could be proved; and that it was not necessary to go into the issue on the second plea, as the general issue was an answer, the plaintiff not having been guilty of any trespass. *Bompas*, Serjt., in *Hilary* Term obtained a rule to shew cause why the nonsuit should not be set aside, relying on *Bates v. Pilling* (a).

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Platt now shewed cause.—The nonsuit was right, as there was no evidence offered of any imprisonment by the defendant, the imprisoning him under the attachment being the act of the Court of *King's Bench* in awarding the attachment. The defendant is no more liable in trespass than a prosecutor would be who presents an indictment to a grand jury, and which is afterwards found by

(a) 6 B. & C. 38; 9 D. & R. 44.

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them. [*Parke*, B.—The defendant put the Court in motion, and he took the order on which the plaintiff was imprisoned under the attachment, and served it on the gaoler. Suppose that order was irregular, how is that to be shewn under the plea of the general issue?] The plaintiff was already in custody, and it was the Court that awarded the attachment against him. [*Lord Abinger*, C. B.—If a man does any act which is *prima facie* a trespass, he must justify that act by shewing the authority under which he acted; as, for instance, if there be a judgment against a party, and a process is issued to take him in execution, and the sheriff takes him on that process, he must shew his authority for doing so; but where the party only does that which brings him into judgment, and the Court sends him to prison, the imprisonment is the act of the Court, and it is no trespass in him. Here, the plaintiff was not taken into custody, as he was already in custody, and it was the Court who ordered his detention.]

Bompas, Serjt., *contra*, was stopped by the Court.

PARKE, B.—It appears to me that this rule ought to be made absolute. The Marshal would not have detained him if the attachment had not been lodged: then, is not that the act of the defendant? The act complained of is one which was done in consequence of the act of the defendant himself. The plaintiff has been brought into Court in consequence of the act of the defendant, and he is called upon to justify that act. This question arose on the general issue. It appears to me that the case was stopped too soon, and that the facts which were stated called upon the defendant to justify them.

BOLLAND, B.—I am of the same opinion. It appears to me that the defendant was the moving cause of the plaintiff's imprisonment, and he could not, under the

general issue, shew that the imprisonment was the act of the Court. The judgment ought to have been pleaded as a justification.

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ALDERSON, B.—I am of the same opinion. The defendant takes a piece of paper to the Marshal, and the Marshal keeps the plaintiff in custody in consequence of that piece of paper having been delivered to him. The defendant ought to justify that act. If the argument for the defendant be correct, why do we impose terms that parties shall not bring actions? Under the general issue, it is sufficient to shew an imprisonment by the act of the defendant, and that the plaintiff was detained in custody in consequence of that act. The plaintiff proposed to do so, and therefore I think the nonsuit was wrong.

LORD ABINGER, C. B.—There must in this case be a new trial, but I still retain the same opinion that I expressed at the trial. I do not consider that the imprisonment must be taken to be the act of the defendant himself. Here the Marshal was the officer of the Court. The mere act of serving a person who already has a party in custody with a writ, directing him to keep him in custody, does not make the party who so serves it a trespasser. Take the case of a detainer lodged against a prisoner; the lodging of it is not of itself an act of trespass so long as he remains in custody under the former process. The rest of the Court seem to think that the act of bringing up the plaintiff, to be charged with the attachment, made it a new custody. I do not say that it may not be so, but I incline to think that it is not, as the detainer was the act of the Court. The Marshal has him in his custody; and if the Court of *King's Bench* removed into another county, the Marshal must go also, and take his prisoner with him. There must, however, be a new trial.

Rule absolute.

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DUCKWORTH v. ALISON.

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated that in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work 5*l.* weekly and every week, such penalty to be deducted from the amount which might remain due on the completion of the work :—
Held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or recover it.

ASSUMPSIT for goods sold and delivered, and work and labour. The defendant pleaded several pleas, the third of which was, as to 55*l.*, parcel &c., that by certain articles of agreement between the plaintiff of the one part, and the defendant and *Archibald Mansfield* of the other part, it was recited that the defendant was the owner of a warehouse and premises in *Liverpool*, and that he had contracted and agreed with the plaintiff for the altering and repairing of the said warehouse for the sum of 815*l.* 19*s.*, in the manner and upon the terms in the said articles after expressed and referred to, upon the express condition that the plaintiff should find and procure good and sufficient surety for the due and faithful performance of the said contract, and that the said *A. Mansfield* had agreed to join in and execute the said articles as the surety of the plaintiff, in the manner thereafter expressed; and in and by the said articles, the plaintiff and the said *A. Mansfield* did for themselves jointly as well as severally, and for their joint and several heirs, executors, and administrators, covenant, promise, stipulate, and agree to and with the defendant, his executors, and administrators, that the plaintiff should and would, on the day of the date of the said articles, proceed to alter, repair, and build the aforesaid warehouse, conformable to a certain plan to the said articles annexed, and under the direction of *John Broadbent* of *Liverpool*, architect and surveyor, in every branch and department of business, as might be requisite for the carrying on and completing the work, according to the stipulations in the said articles in that behalf mentioned, in a substantial and workmanlike manner, *in three months* from the date of the said articles; and *in the event of the said work not being fully and effectually completed in the aforesaid period to the satisfaction and approval of*

the said J. Broadbent, he, the plaintiff, should forfeit and pay to the said defendant the sum of 5l. weekly and every week he should be engaged in such work beyond the said period of three months, such penalty or forfeiture to be deducted from the amount which might remain owing from the defendant to the plaintiff on the satisfactory completion of the aforesaid work: in consideration whereof, and of the aforesaid covenants, conditions, and agreements being fully complied with, the defendant did by the said articles covenant, promise, and agree to and with the plaintiff, his executors and administrators, in manner following, that is to say, that he the defendant should and would pay, or cause to be paid, at the times and in manner in the said articles after mentioned, unto the plaintiff, the several sums therein specified, making together the total sum of 815l. 19s.; as by the said articles, reference being thereunto had, would appear. And the defendant alleged, that though the plaintiff duly proceeded to alter, repair, and build the said warehouse, under the directions of the said J. Broadbent, in pursuance of the said articles, yet the plaintiff did not do, execute, and perform all and singular the covenants and stipulations in the said articles in that behalf mentioned in a substantial and workmanlike manner in three months from the date of the said articles; but the defendant said, that on the contrary thereof, the said work was not fully and effectually completed in the aforesaid period to the satisfaction of the said J. Broadbent, nor until the lapse of, to wit, eleven whole weeks after the end of and beyond the said period, during the whole of which the said work was incomplete; and the plaintiff was, during each of the said eleven weeks beyond the said period, engaged in the said work, whereby and by force of the said articles, the plaintiff became liable to pay to the defendant the sum of 55l., being after the rate of 5l. weekly, and for each of the said eleven weeks beyond the period during which the plaintiff was so engaged in the said work as aforesaid. And the defendant

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saith, that he did, before the commencement of this suit, at the times and in manner in the said articles mentioned and provided for, pay to the plaintiff the said total sum of 815*l.* 19*s.* for and in respect of the said work in the said articles mentioned, without deducting or retaining therefrom the said sum of 55*l.*, or any part thereof. And the defendant saith, that the said sum of 55*l.*, and every part thereof, was at the commencement of this suit, and still is, due from the plaintiff to the defendant, by virtue of the said articles; and which said sum equals and exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said several promises in the declaration mentioned, so far as the same relate to the said sum of 55*l.*, parcel &c. :—and the plea concluded by offering to set off this sum. The plaintiff replied that the defendant did not pay the 815*l.* 19*s.*, and that he did not owe the said sum of 55*l.*

At the trial before *Parke*, B., at the last *Liverpool* Assizes, the jury found a verdict for the defendant.

Alexander now moved to enter up judgment for the plaintiff on the third issue, *non obstante veredicto*.—The plea admits that there was work done by the plaintiff to the amount of 55*l.*, which was not within the contract. It admits that sum to be due independently of the contract; and then the defendant seeks to set-off the penalty incurred under the contract against the extra work, after having paid the whole of the contract price; this, it is submitted, he is not entitled to do. He cannot be allowed to obtain the penalty except in the mode pointed out by the articles of agreement, that is, by deducting it from the contract price. He could not recover it in any other way. The plea admits that he did not deduct it, and he cannot now avail himself of it, having waived his right to do so.

PARKE, B.—We all think that this power of deducting

the penalty from the contract price was an additional power. There is an absolute covenant to pay it, which is not at all restricted by the subsequent part of the contract. The defendant had a double remedy, either to set it off as a payment, or to deduct it from the contract price.

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Rule refused.

HARDING v. FORSHAW.

ACTION to recover the sum of 244*l.* 17*s.* 6*d.* for commission on the purchase and sale of certain lands by the plaintiff as the commission agent of the defendant, and for money paid to the defendant's use. The cause and all matters in difference between the parties were referred to arbitration at the last *Liverpool* Summer Assizes, under an order of *Nisi Prius*, by which it was ordered, that "the costs of the suit, and of the reference and award, and all other costs, should abide the event, as in the case of a trial at law; final judgment to be entered up for the plaintiff or the defendant according to the award, for any damages or costs awarded to either of them, and execution to issue." The arbitrator made his award in the following terms:—"First, I award and find that *John Harding*, the plaintiff, has no cause of action against *John Forshaw*, the defendant, but on the contrary; and I do award, that the plaintiff shall pay unto the defendant, on &c., at &c., the sum of 36*l.* 14*s.* 4*d.*, which sum I award and find to be due and owing from the plaintiff to the defendant: and I declare that my award is not intended to

An action for certain commission on the purchase of land, and all matters in difference between the parties, were referred to arbitration; the costs of the suit and of the reference and award, and all other costs, to abide the event; final judgment to be entered up for the plaintiff or defendant, according to the award, for any damages or costs awarded to either of them, and execution to issue. The arbitrator awarded, that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay

to the defendant the sum of 36*l.* 13*s.* 4*d.*, which he found to be due and owing from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from the receipt of his commission on certain land purchased, to which he would be entitled under a certain agreement:—*Held*, that the arbitrator had no power given him to order a verdict to be entered, but merely to decide whether the plaintiff had any cause of action against the defendant; and that the award was sufficiently final.

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exclude the said *John Harding* from the receipt of his commission on the land purchased from Mr. *Culshaw*, at *Edge Hill*, which he will be entitled to receive according to the terms of an agreement marked B., and signed by the said *John Forshaw*."

Addison, in *Hilary* Term (a) last, moved to set aside the award on the ground that it was not final. The arbitrator has awarded that the plaintiff has no cause of action; but he has not said how the cause was to be determined; and it is impossible for the Court to say for whom the arbitrator intended that the verdict should be entered. [*Parke*, B.—It ought to be entered up as on a judgment by confession.] It is submitted that the arbitrator ought to have said so in express terms. [*Alderson*, B.—He has awarded that the plaintiff has no cause of action, and that a sum of money is due and owing from the plaintiff to the defendant; is not that deciding for the defendant against the plaintiff?] Unless he award how the verdict is to be entered up, the costs cannot be taxed. In *Norris v. Daniel* (b), where the costs of the action and of the award were to abide the event of the award, and the arbitrators awarded that the plaintiff had a good cause of action on five out of eight counts; that the defendant should pay 5*l.* damages; and that no further proceedings should be had in the action; it was held, that there was no award as to three counts—no event to authorize the taxation of costs on those counts; and that no part of the award could stand. [*Parke*, B.—That is not like the present case, because here the arbitrator has decided that the plaintiff has no cause of action.] In *Leeming v. Fearnley* (c), where a replevin suit and all matters in difference touching the distress were referred, the

(a) The Reporters were not enabled to procure the papers in time for this case to appear in its proper place.

(b) 10 Bing. 507; 4 M. & Scott, 383.

(c) 5 B. & Ad. 403; 2 Nev. & Man. 232.

costs of the suit to abide the event, and the arbitrator awarded that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff should pay the defendant 6*l.*, and that the action should be no further prosecuted; it was held, that the award did not shew who ought to pay the costs which were to abide the event of the suit; and consequently, that it was not final. It certainly did not appear for what rent the defendant had avowed. [*Parke*, B.—It was put on that ground.] In *Grundy v. Wilson* (a), where the arbitrator found one issue for the defendant, and awarded the payment of rent due to him, but ordered no verdict or judgment to be entered; it was held, that the defendant was not entitled to enter up judgment in the action for the rent and the costs of the action, which had been taxed to him. That was a strong case, for there the merits of the case had been disposed of by the arbitrator. [*Parke*, B.—Here the arbitrator decides, that the plaintiff has no cause of action. The arbitrator had no power given him to order a verdict to be entered up. All that he had to decide was, whether the plaintiff had any cause of action, and then judgment was to be entered up according to his decision upon that point.] *Secondly*, the award is not final in another respect, for he declares that it is not to preclude the plaintiff from the receipt of his commission on the land purchased from Mr. *Culshaw*, which he will be entitled to receive under a certain agreement. Instead of settling that difference between the parties, he leaves it undisposed of.

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PARKE, B.—He says that there is nothing due at present.

ALDERSON, and GURNEY, Bs., concurred.

Rule refused.

(a) 7 Taunt. 700.

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SIBONI *v.* KIRKMAN and Another, Executors of JOSEPH KIRKMAN, deceased.

The lapse of twenty years from the time of making a contract to be performed *in futuro*, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract.

THE declaration stated, that on the 29th of *October*, 1814, the plaintiff was about to leave *England*, and had delivered a certain instrument, of the value of 40*l.*, to the defendant's testator, who had accepted and taken it in exchange, and thereupon, in consideration that the plaintiff had agreed to purchase of him, on his return to *England*, a grand piano forte, the testator undertook to sell him such grand piano forte, and to be accountable to him for the said 40*l.* in part payment thereof. It was then averred, that the plaintiff did return to *England* after the death of the testator, and offered to purchase a grand piano forte, and to pay the reasonable price thereof, after deducting the said 40*l.*, but that the defendants refused to sell. *Pleas*—*first, non-assumpsit* by the testator; *secondly*, that, after the making of the promise by the testator, he sold to the plaintiff, and the plaintiff purchased, a grand piano forte, to wit, of the value of 73*l.*, in consideration and exchange of the said instrument delivered to the said testator, and of a certain sum of money, to wit, 33*l.*, then paid by the plaintiff, and that the grand piano forte bought by the plaintiff was delivered to the plaintiff, and had and received by him in satisfaction and discharge of the promise of the testator. The replication denied the facts alleged in this plea. At the trial before Lord *Abinger*, C. B., at the sittings in *London* after last *Michaelmas* Term, the plaintiff put in the agreement, which was as follows:—

“ I hereby acknowledge that I am accountable to Signor *Siboni* in the sum of 40*l.*, in part payment of a grand piano forte, which he agrees to purchase of me on his re-

turn to *England*, the said sum of 40*l.* being the value of an instrument which I have taken of him in exchange.

“ *Joseph Kirkman.*”

“ *Broad Street, October 29, 1814.*”

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It was proved that the plaintiff was in *England* in the year 1834, but it did not appear that he had been in this country since about the time the agreement was signed, until that year. The action was brought more than twenty years after the date of the agreement.

The defendant's counsel offered no evidence, but submitted to the jury that they would presume that the contract was satisfied after this lapse of time. His lordship told the jury, that, as the plaintiff had not proved that he had not been in *England* since the time the contract was signed until he made this claim, they would be warranted in presuming a satisfaction of the original contract. The jury having found a verdict for the defendant,

Cresswell, in last term, obtained a rule to shew cause why there should not be a new trial, on the ground that this was a misdirection, because, the plea being specific, and containing an allegation of a precise contract, it was incumbent upon the defendant to give evidence of such contract.

Kelly and *Hoggins* shewed cause.—There was no misdirection in this case, and the verdict may well be supported. The plea in effect amounts to a plea of performance of the contract alleged in the declaration, and after the lapse of so long a period of time the jury would be warranted in presuming that it had been performed. It must be taken that the contract was executed at the time it bears date. Assuming that the plaintiff's return to *England* was a condition precedent to the performance of the contract, there was no evidence to shew that he had not been in *England* between that date and the year 1834. But the fact of the return is not an essen-

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tial part of the contract. It was contemplated, but was not made part of the contract. [*Bolland, B.*—Supposing the plaintiff had died abroad, his executors would have had a claim on this contract, although in that case he never could have returned.] In order to make the return an essential part of the contract, it must be shewn, that if he had not returned, this deposit of 40*l.* could not have been recovered. Can it be said that if the plaintiff had died after he went abroad, that would have put an end to the contract, and that his executors could not sue for the deposit? The question on these facts is, whether the jury had not a right to presume that the contract had been performed. [*Parke, B.*—If it is an essential part of the contract that the plaintiff should return to *England*, then his rights did not accrue until he returned.] It is submitted that it was not, and that the same presumption might be made in this case as in the other cases where payment is presumed after a long lapse of time. [*Parke, B.*—Would not a special request be necessary in this case? In all the cases which you refer to, no request or demand was requisite. Suppose the plaintiff's return to *England* was essential, would not a request be necessary?] It is submitted that a presumption of a demand would arise after a lapse of twenty years. The jury were asked to presume that the piano forte had been delivered; if a request were necessary, then they might presume that a request had been made. It will be said that this is only a special plea of accord and satisfaction; but it is submitted that it is substantially a plea of performance. It only differs from a distinct plea of performance in stating that the instrument was accepted in satisfaction. It is submitted that the case was properly left to the jury, and that there was abundant evidence to warrant their finding.

Cresswell and Martin, contra.—It was an essential part of the contract that the plaintiff should return to *England*, as that was the event on which the performance was to

depend. The Statute of Limitations would only begin to run from the return, and any presumption of payment or performance would only arise with reference to the same time. Therefore no presumption could arise before that event had taken place. In the case of a bond more than twenty years old, and where there has been no payment of interest, nor any acknowledgment of the existence of the debt, the presumption of law is, that it has been paid ; but, if it be shewn that the party is out of the country, the jury would not be called upon to make any such presumption. Then the jury ought not to have been called upon to make such presumption in the present case. But even if this were not an essential part of the contract, this plea is not a plea of performance, but states a new special contract by which it is said that the original contract was superseded. If it had been pleaded as a plea of performance, the defendant must have given some evidence of it, or must have shewn the plaintiff's return to *England* in sufficient time for the presumption to arise. It is submitted that the plaintiff could not have demanded the piano forte whilst he continued abroad. If it be said that that would be a hardship upon him, the entering into such a contract was his own folly. [*Parke, B.*—I feel a difficulty in putting that strict construction upon this agreement, as I cannot see how the plaintiff's personal return could have been of any importance to the testator.] It might have been of great importance to the plaintiff that he should have the privilege of purchasing the piano forte when he did return, and *Kirkman* would have had the advantage of not paying the 40*l.* if he died. [Lord *Abinger, C. B.*—According to that argument, do you not assume that the contract would be at an end if *Kirkman* died?] It is submitted not, as *Kirkman's* executor would be bound by the contract of his testator. [*Parke, B.*—It is implied that it is to be a contract for a piano forte of his own manufacture, and he is prevented by the act of God. He undertakes to make the article.]

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His executors would be liable if it were not completed according to the contract. [Lord *Abinger*, C. B.—I apprehend the executors of a deceased person are not bound to carry on any trade whatever. Here the testator was dead before the claim was made, and his trade had ceased to be carried on.] Suppose a man is paid beforehand for building a ship, which must take a considerable time in building, and before it is completed he dies, it is apprehended that if the executors have not the ship ready at the time when the contract expires, they would be liable. [Lord *Abinger*, C. B.—If he dies before the contract is complete, the executors must either refund the money, or get some other person to complete the ship according to the contract. *Parke*, B.—You say he undertakes to live to complete it. The act of God does not excuse him, if he makes a positive contract. It is laid down in *Roll's Abr.*, that the act of God shall not excuse him.] If this plea be taken to allege a new contract, which was taken in satisfaction of the original contract, it ought to have been proved specifically. If it be taken as a plea of performance, there was no proof that the plaintiff ever was in *England* after his departure abroad until 1834, and therefore no time has been fixed from which any presumption could arise.

Cur. adv. vult.

The Court afterwards made the rule absolute, on the ground that the Lord Chief Baron had not left it to the jury to say whether they found the specific contract alleged in the plea or not.

Rule absolute for a new trial.

The case was again tried at the Sittings in *Trinity Term*, before *Parke*, B., when the evidence being nearly the same as that given on the former trial, he directed the jury

to find for the plaintiffs, upon the ground that there was no evidence to prove the plea. The jury found a verdict for the plaintiffs, and the defendant's counsel tendered a bill of exceptions to the summing up of the learned Judge; but, to avoid the necessity of carrying up the bill of exceptions to the Court of error,

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Kelly afterwards moved in arrest of judgment.—The declaration alleges a personal contract with the testator, and therefore a piano forte of the testator's own manufacture was to be purchased. [*Parke, B.*—How does that appear on the record? It is not alleged that the testator was a piano forte maker.] It is to be implied from the contract as stated. Then, as the testator was dead before any demand was made, his executors are not liable. [*Parke, B.*—Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required.] To enable them to perform this contract, the executors must carry on the trade of the testator, which they cannot be compelled to do, and therefore it never could have been intended. [*Parke, B.*—That is not necessary. All that the executors are bound to do, is to procure a grand piano forte, and exchange it with the plaintiff. This is like the case of *Quick v. Ludbarrow* (a), where the testator had covenanted to build a house, and the executors were held bound to carry on the building after the testator's death. *Marshall v. Broadhurst* (b) was the converse of that case. There, the testator agreed to do certain work, and died before the work was begun. The executors did the work, using the materials of the testator; and it was held that they might recover the value of the materials in an action by them in their representative

(a) 3 Bulstr. 30.

(b) 1 Cr. & J. 403.

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character.] There the testator had brought the materials to the spot to commence the work.

LORD ABINGER, C. B.—If I am called upon to give any opinion, I at present think there ought not to be any rule. On the former occasion, I understood that the declaration had stated that *Kirkman* was a piano forte maker. I think you had better proceed with the writ of error.

Rule refused.

WHITE v. BARRACK and Another. .

An assignment of a bail-bond is invalid, if executed in the presence of and attested by the plaintiff in the action and another person; the statute 4 *Anne*, c. 16, s. 20, requiring the assignment to be made to the plaintiff in the presence of two credible witnesses, which means disinterested persons.

DEBT on a bail-bond by the assignee of the sheriff. The defendant by his plea traversed the assignment.

At the trial before *Alderson*, B., it was proved that the under-sheriff executed the assignment of the bail-bond to the plaintiff in the plaintiff's presence, and that the plaintiff, together with another person, attested the execution of it. *Platt*, for the defendants, submitted that this was not a valid assignment, inasmuch as it was not executed as required by the 4 *Anne*, c. 16, s. 20, in the presence of and attested by two credible witnesses; that the words credible witnesses must mean competent witnesses; and that the plaintiff being one of the two, he was not a competent one, on the ground of interest. The learned Judge directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit. *Platt* having in *Hilary* Term last obtained a rule accordingly,

Busby now shewed cause.—The statute enacts, “ That the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorsing the same,

and attesting it under his hand and seal in the presence of two or more credible witnesses." The direction to the sheriff is to attest it under his hand and seal *in the presence of* two credible witnesses, but it is not necessary that there should be any attestation *by* witnesses (a); it is sufficient if it be in the presence of two witnesses. Supposing the plaintiff not to be a competent witness, there would still remain one, and the under-sheriff himself may be considered as one of the witnesses, and he would be a competent witness. [Lord Abinger, C. B.—He is the attorney for the sheriff: he cannot be a competent witness.] *Busby* then referred to *Helliard v. Jennings* (b), *Holdfast v. Dowsing* (c), and *Wyndham v. Chetwynd* (d), as to the meaning of the word *credible* in the 5th section of the Statute of Frauds respecting the attestation of wills.

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PER CURIAM.—The words of the statute of *Anne* imply that the witnesses shall be disinterested persons, not the sheriff nor the plaintiff. It contemplates that they shall be two different persons from the assignor and assignee.

Rule absolute.

(a) *Philipps v. Barber*, 1 Scott, 514.

322.

(c) 2 Stra. 1253.

(b) 1 Ld. Raym. 505; Carthew,

(d) 4 Burn's Eccl. Law, 90.

MILLS v. JOSEPH BARBER.

ASSUMPSIT against the acceptor of a bill of exchange drawn by one *Samuel Barber* upon the defendant for the sum of 100*l.*, payable two months after date to the order

Assumpsit by the indorsee against the acceptor of a bill of exchange.

Plea—that the

defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did he the defendant receive, any consideration for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration. Replication—that the drawer indorsed the bill to the plaintiff for a good and valuable consideration:—*Held*, that it was not incumbent on the plaintiff to begin, and prove, in the first instance, that he gave value for the bill; but that the rule is otherwise, where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen.

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of the drawer, and by him indorsed to the plaintiff. The defendant pleaded that he accepted the bill at the request and for the accommodation of the said *Samuel Barber*, and that the said *Samuel Barber* did not give, nor did he the defendant have or receive, any value or consideration for his the defendant's accepting or paying the said bill of exchange; that the said *Samuel Barber* indorsed the said bill to the plaintiff without any value or consideration, and that the said *Samuel Barber* and the said plaintiff have always respectively held the said bill without any value or consideration. Verification.—Replication, that the said *Samuel Barber* indorsed the said bill of exchange to the plaintiff for a good and valuable consideration; concluding to the country. At the trial before *Alderson*, B., at the *Middlesex* Sittings in *Hilary* Term last, a question arose whether the plaintiff was bound to prove consideration for the bill, or whether the defendant was not bound to shew the want of consideration; the learned Judge held the latter, and the defendant not being prepared to prove the want of consideration, he directed a verdict to be entered for the plaintiff.

Humfrey, in the same term, obtained a rule to shew cause why there should not be a new trial, on the ground that the onus lay upon the plaintiff, relying on *Simpson v. Clarke (a)*, where Lord *Abinger*, C. B., intimated an opinion in the course of his judgment, that, where the pleadings are such as in the present case, it is incumbent upon the plaintiff to prove the consideration. Against this rule, on a former day in this term,

Theobald shewed cause.—The question arises, from the admission on the record that this was an accommodation bill, whether the plaintiff was bound to prove consideration, or whether the defendant ought to have shewn the

(a) 2 C. M. & R. 342.

want of it. The decision of the learned Judge at the trial was perfectly right; and it was not incumbent on the plaintiff to prove consideration in the first instance. Undoubtedly, the replication does allege affirmatively that the plaintiff gave valuable consideration for the indorsement, but he was not therefore bound to prove it in the first instance. In *Low v. Burrows* (a), where, to an action on a bill of exchange by the drawer against the acceptor, the defendant pleaded that there was no consideration for the acceptance; and the plaintiff replied that there was consideration for the acceptance, to wit, the sale and delivery of goods, concluding to the country, as in the present case: it was held that the plaintiff was not bound to prove the consideration alleged, and that it lay on the defendant to shew want of consideration. [Alderson, B.—The replication is in the affirmative, but it is in answer to a negative. Upon the question as to who is to begin, is it not the proper test to examine whether, if the particular allegation be struck out of the plea, there will or will not be a defence to the action? It is immaterial whether the allegation be in the affirmative or negative. Parke, B.—There is no difficulty on that part of the case: the burthen of proof is certainly on the defendant. Lord Abinger, C. B.—The question is, whether, supposing the defendant to have proved those facts which the replication admits, it did not become incumbent on the plaintiff to prove his title to sue by shewing that he was not the mere agent of the party who had received the bill without consideration. The plaintiff is not compelled to do so, unless the defendant has shewn some fraud or some defect of that nature in the plaintiff's title. In *Bayley on Bills* (a), it is said, "In many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note *bond fide*, and for value. As in case of a bill or note

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(a) 2 Ad. & Ellis, 483; 4 Nev. & Man. 366.

(b) P. 372.

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originally given without consideration, *and* whilst the person giving it was under duress, or in case of a bill or note obtained by fraud, or in case of a transfer by delivery by a person not entitled to make it, as in the instance of bills or notes which have been stolen." It is not there said that the mere fact of the bill being an accommodation bill throws the proof of value on the holder, but only in cases where there is some fraud, or something of a similar nature. *Fentum v. Pocock* (a) will probably be referred to, to shew that the practice in actions upon accommodation bills is for the plaintiff to prove that he gave value. But that was not the point decided in that case, for there it was quite immaterial as respected the decision whether the plaintiff had given consideration for the bill or not. An accommodation bill cannot be considered to be like the case of a fraudulent transfer. [*Parke, B.*—It is rather a fraud upon the holder than the acceptor. *Alderson, B.*—In *Percival v. Frampton* (b), *Parke, B.*, says—"The only fact admitted on the pleadings is that the indorsement was for the accommodation of the maker, but that raises no inference that the plaintiffs were holders without consideration." The object of an accommodation bill is to enable the drawer to raise money, and therefore the inference is the other way. Lord *Abinger, C. B.*—The difficulty I have felt is to compel the defendant to give evidence of a transaction with which he has no privity.] He can do that which it is said the plaintiff can do, namely, call the party who transferred it. [*Parke, B.*—A bill of exchange *prima facie* imports consideration, and it always struck me that some suspicion must be thrown on the plaintiff's title in order to rebut that. The mere giving of a notice requiring the plaintiff to prove consideration was held by Lord *Ellenborough*, in *Reynolds v. Chettle* (c), to be insufficient to compel the plaintiff to do so. In *Thomas v. Newton* (d) the plaintiff's title was im-

(a) 5 Taunt. 192.

(b) 2 C. M. & R. 183.

(c) 2 Camp. 596.

(d) 2 Car. & P. 606.

peached. In *Low v. Chifney* (a) the Court of *Common Pleas* agreed to this doctrine. The defendant not having impeached the title of the plaintiff to the bill, nor shewn any fraud or cast any suspicion upon it, is in my opinion entitled to retain his verdict.]

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Humfrey, contra.—The simple question is, whether, when it is admitted on the pleadings that as between the original parties this is an accommodation bill, and accepted without consideration, the plaintiff is not bound to prove that he gave value for it, according to the decision of the Court of *King's Bench*, by a majority of the Judges, in *Heath v. Sansom* (b). [*Parke, B.*—The decision of this Court in *Percival v. Frampton* (c) was to the contrary.] It is there said, that, in the case of an accommodation bill, it may be presumed that value has been obtained for it; but that where a bill has been obtained by fraud, or has been lost or stolen, the inference might arise that the holder had not given full consideration for it. It is, however, difficult to see why the holder of a bill which may have passed through many hands since the fraud or loss, is not quite as likely to be a holder for value, as when it was originally an accommodation bill. The principle which requires the plaintiff to prove consideration in the one case is equally applicable to the other; assuming that a party who obtains a bill by fraud would part with it for little value, the same reasoning applies to accommodation bills, where the party gets the bill for nothing. It is important that some clear rule should be laid down, because since the new rules the question comes before the Court every day. The authorities being conflicting, it will be safer to adhere to the decision of the Court of *King's Bench* in *Heath v. Sansom*, and that is the most convenient rule to adopt. It must be admitted that in *Lewis v. Lady Hyde Parker*,

(a) 1 Bing. N. C. 267; S. C. 1 Scott. 95.

(b) 2 B. & Adol. 291.

(c) 2 C. M. & R. 180.

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Williams, J., at *Nisi Prius*, ruled according to the decision of this Court in *Percival v. Frampton*, and the Court of *King's Bench* in this term decided that he was right, on the authority of that case; but it is submitted that that decision was erroneous. [*Bolland, B.*—In *Wyatt v. Bulmer* (a), *Eyre, C. J.*, held, that the circumstance of the original transaction being contrary to law, (provided the security was not declared to be void by law) did not, where the action was by a remote indorsee, necessarily call upon him to prove the consideration; and that if the defendant meant to call upon the holder to prove consideration, it would be necessary to implicate him some way in the transaction, or to shew some degree of privity respecting it.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

Lord ABINGER, C. B.—This was an action against the acceptor of a bill of exchange, in which the defendant had pleaded that the bill of exchange was given without any consideration, and for the accommodation of the drawer, and indorsed to the plaintiff without value; to which the plaintiff replied, that it was indorsed to him for a valuable consideration. At the trial, the plaintiff stood upon his right, contending that the possession of the bill itself was *prima facie* evidence of consideration; the defendant insisted that it was cast upon the plaintiff to prove affirmatively that he did give value for the bill. Neither party choosing to act, the learned Judge took it upon himself, and directed the verdict to be entered for the plaintiff. The question is, whether he was right in so doing. It is rather a question of practice than of law. No doubt the rule of law is, that, where a plaintiff has not given consideration for a bill of exchange, for which no consideration

(a) 2 Esp. Rep. 538.

has been previously obtained, he cannot recover upon it. But the doubt is as to which party is required to give evidence. Cases were cited to shew the practice to have been for the plaintiff to prove consideration given by him. I must own, that, as far as my experience has gone, that was the course. I never have known the point mooted except in certain cases. A practice had grown up of giving a notice to the plaintiff calling upon him to prove consideration, and it was a very general course, where such a notice had been given, for the plaintiff to do so in the first instance. But I have known cases where the plaintiff has refused at first, and then the defendant having proved that the bill was an accommodation bill, the plaintiff has in reply given proof of his being a holder for value. The Judges have taken this question into consideration, it having become much more important to settle it, than the particular manner in which it should be settled. The Court of *King's Bench* has been consulted; and *Littledale, J.*, and *Patteson, J.*, have withdrawn the opinions which they expressed in the case of *Heath v. Sansom*. In *Simpson v. Clarke*, undoubtedly I stated what I now state, that the practice was for the holder to prove that he gave value for the bill. I cannot say that I have departed from that opinion without some consideration of the public convenience. In *Simpson v. Clarke*, I expressly stated that I did not decide the case upon this point, and I said it was not intended to determine the question. It is impossible to read my judgment in that case without perceiving that I abstained from deciding it. I think I made a distinction between bills given for accommodation only, and cases of fraud. There is, indeed, a substantial distinction between them, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into Court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an

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accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, I lent my name to the drawer for the purpose of his raising money upon the bill, the probability is, that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of a fraud be raised from its being shewn that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen, in which cases the holder must shew that he gave value for it, the *onus probandi* is cast upon the defendant. The decision of the present case requires only to lay down this rule, that, where there is no fraud, nor any suspicion of fraud, but the simple fact is, that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill. That seems to be the opinion generally prevailing among the Judges. In this case, the *onus probandi* lay on the defendant, and he ought to have gone farther. But, under the circumstances of the case, the defendant may have a new trial on payment of costs.

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The writ of trial under the rule of *Hilary Term*, 4 *Will.* 4, is conclusive as to the date of the writ of summons stated in it, and evidence is not admissible to contradict it.

But where a wrong date is inserted in it, the Court will

set aside the trial, and order the writ of trial to be amended.

ASSUMPSIT for goods sold and delivered, to which the defendant pleaded a tender; the plaintiff replied a writ sued out before the tender, and issue thereon. A writ of trial had been directed to the under-sheriff of *Devonshire*, which stated, according to the form given in the schedule to the rule of *Hilary Term*, 4 *Will.* 4, the date of the writ to be the 24th of *November*. The tender was proved to have been made on the 11th of *December*, and the defendant proposed to call evidence to shew that

the writ which was sued out on the 24th of *November* had been abandoned, and a fresh writ sued out, which was served on the 26th of *December*. The under-sheriff, however, being of opinion that the record was conclusive, refused to receive the evidence, and the plaintiff obtained a verdict.

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J. Greenwood, in *Hilary* Term last, moved for a rule to shew cause why there should not be a new trial.—He contended that it was always competent for a party to shew that the actual commencement of the suit was at a different time from that which appeared on the record; and cited *Lester v. Jenkins* (a). [*Parke*, B.—In that case the proceedings were by bill. This is a record framed by the rule of Court under the authority of the act of Parliament, which requires the precise day on which the writ issued to be inserted in it. The record must be conclusive on this point. Lord *Abinger*, C. B.—You may take a rule why the former writ of trial should not be set aside, and why the record should not be amended at the costs of the plaintiff's attorney.]—Against this rule,

Wightman now shewed cause,—on affidavits which stated that the writ had been originally sued out against the defendant by the name of *Richard Manley*, on the 24th of *November*, and that the same writ was afterwards altered and resealed on the 19th of *December*, and served again on the 26th of *December*. He contended that the writ did not date from the resealing, but from the time it originally issued. *Braithwaite v. Lord Montford* (b). [*Parke*, B.—See what injustice would be done to the defendant. He might have moved to set it aside in the mean time. *Alderson*, B.—You altered it and resealed it behind his back.] He then contended that if there

(a) 2 Man. & R. 429; 8 B. & C. 339.

(b) 2 C. & M. 408.

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were any objection to the date of the writ in the writ of trial, the defendant ought to have applied before the trial to compel the plaintiff to insert the true date, and that it was now too late to do so.

Greenwood, contra.—In *Braithwaite v. Lord Montford* the alterations were made before the service of the writ, which distinguishes it from the present case. As to the observation that since the new rules the writ of trial is conclusive of the date of the writ of summons, it is apprehended that it is open to the defendant to shew the time when it actually issued. In *Wilton v. Girdlestone* (a), a bill against an attorney was filed of *Michaelmas* Term, and it appeared by the memorandum on the record to have been filed on the 28th of *November*; and it was held, that evidence was admissible to shew that it was actually filed on the 24th of *December*. [*Alderson*, B.—There the bill was filed as of *Michaelmas* Term. There could not then be any proceedings as of the vacation.] He also cited *Granger v. George* (b). [*Parke*, B.—The rule was refused on this point, and the Court was of opinion that there was no doubt that the writ of trial could not be contradicted. The time was stated in the form of the writ in order to prevent all question of it at the trial.] He then contended that the alteration having been made after the first writ had been served, the resealing was the time from which it was to date; and cited *Miller v. Miller* (c), and *Glenn v. Wilks* (d).

Lord ABINGER, C. B.—There must either be a *stet processus*, if the parties will agree to it, or the plaintiff must amend the record by substituting the 19th of *December* for the 24th of *November*.

The parties acceded to a *stet processus*.

(a) 5 B & Adol. 847.

(c) 2 Bing. N.C. 66; 2 Scott, 117.

(b) 7 D. & R. 729; 5 B. & C. 149.

(d) 4 Dowl. P. C. 322.

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SYBRAY v. WHITE.

CASE.—The declaration stated that the plaintiff was possessed of a certain close called the *Bean Croft*, in the county of *Derby*, and of a mare of great value, to wit, &c., which was depasturing in the said close; and that the defendant was possessed of a certain lead mine called *Ox Close Mine*, and of a shaft in the said close leading and belonging to the said mine; by means whereof he the said defendant ought to have kept the said shaft well and securely fenced round, to prevent cattle depasturing in the said close from falling into the said shaft; yet that the said defendant, not regarding &c., suffered and permitted the said shaft to be and remain open, whereby the said mare of the said plaintiff fell down the same, and was thereby killed. The defendant pleaded, *first*, that he was not possessed of the said lead mine; *secondly*, that he was not bound to keep the shaft covered.

A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miners' jury were called, and they should say that the shaft was his, he would pay for the horse. A miners' jury was accordingly called, and they found in writing that the shaft was his:—*Held*, that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case to recover compensation for the loss of the horse.

Held, also, that as the document in question

At the trial before *Gaselee, J.*, at the last *Summer Assizes* for the county of *Derby*, it was proved that the plaintiff was possessed of the close mentioned in the declaration, in which there was a shaft leading to a mine, which had been covered up for many years. The top of the shaft, however, gave way under his mare, and she fell down it and was killed. The defendant, who was a miner, had been possessed of a lead mine in the *Ox Close*, and the plaintiff contended that the shaft belonged to his mine. This was denied; but the plaintiff and the defendant met, and the defendant, after denying that the shaft was his, said that if a miners' jury were called, and they said the shaft was his, he would pay for the mare. The premises in question were situate within the wapentake of *Wirksworth*, and in that district there is a court called the barmote court, which is held before the barmaster and a jury

did not, on the face of it, appear to be an award, it need not be stamped as an award.

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consisting nominally of twenty-four miners from the district, but not necessarily of so many persons. The great barmote courts are held regularly every half year, but they may be called out on occasions when required. In this case the plaintiff applied to the barmaster, and desired him to call out a jury, which he did. The jury, consisting of five miners, examined the premises, and determined that the shaft in question belonged to the defendant; which determination they gave in writing. The following is a copy of the proceedings:—

“ Gentlemen of the Jury,

“ You are requested to look over certain lands in the township of *W. and S.*, called *Ox Close* and *Bean Croft*, and to examine the range of the mines, shafts, veins, and meers of ground given away by the barmaster for mineral uses. Copies from the barmaster’s books will be laid before you, and such other information as required, from which you are requested to declare in writing who are the owners of the aforesaid shafts, veins, &c.; and may the God of all wisdom direct you right.

“ *Joseph Sybray.*”

“ *Worksworth* soak and wapentake, *Dec. 27. 1833.* } “ We whose names are hereunder written, being five of the grand jury of twenty-four, and being this day summoned to a certain mine called *Ox Close* and *Bean Croft*, lying and being in the liberty of *Matlock* and wapentake aforesaid, and there having received a bill from Mr. *J. Sybray, &c.*,

“ In answer to the said bill, we have examined the range of the mines, shafts, veins, and meers of ground, as given away *March 15, 1822*, and *September 23, 1824*, by *Francis Hursthouse*, barmaster to *Benjamin White*, and consolidated together as one title, according to the copies produced from the barmaster’s book, *Michael Carding*

24 man. *Anthony Knowles* says that he remembers houses standing upon a hillock in a bush in the *Bean Croft* marked with *O. C.* and *L.*, standing for *Ox Close* and *Lee Wood*. *Mr. Milner* says their right and title was given away by the barmaster and 24. *Mr. G. Tessington* says that the first and second gift was consolidated together as one title. *Mr. J. Hursthouse* says that the gift was consolidated together as by the last evidence ; and it is our opinion that the mines, shafts, veins, and meers of ground lying and being in the *Ox Close* and *Bean Croft* belong to *Benjamin White* and partners. As witness our hands,

“ *William Walker,* *John Taylor,*
 “ *Robert Shaw,* *James Marshall.*”
 “ *Godfrey Taylor,*

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This was offered in evidence on the part of the plaintiff, but was objected to, as being either an award, and therefore subject to a stamp, which it had not, or a species of verdict given by a court, and then the proceedings were not properly established. The learned Judge, however, admitted it. The defendant gave evidence to negative his being in possession of the shaft, or that it belonged to his mine, and also shewed that he was dissatisfied with the result of the first inquiry of the jury, and refused to abide by it, and summoned another jury ; which, however, the plaintiff refused to attend ; but the second determination was in favour of the defendant. The defendant's documents, relating to this latter finding, were similar to those above set forth. The learned Judge put it to the jury to say whether the shaft did or did not belong to the defendant's mine ; stating, however, that he thought the defendant was concluded by his assenting to the inquiry by the first jury, and their finding. The jury found a verdict for the plaintiff, damages 15*l.*, saying that they thought the shaft did belong to the defendant.

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Goulburn, Serjt., in *Michaelmas* Term last, obtained a rule to shew cause why there should not be a new trial, on the ground that the finding of the miners' jury was not admissible in evidence; stating that the learned Judge had told the jury that such finding was conclusive.

Balguy and *N. R. Clarke* now shewed cause.—It is said that the finding of the jury is an award only, and that it was not admissible without a stamp. But this is not an award; it amounts to an admission by the defendant of his liability. He agrees to leave the matter to the jury, and says that if they find the shaft to be his, he will then pay for the loss of the mare. The jury afterwards find that the shaft belongs to him, and then he says, I suppose I must pay. This was in the nature of a reference of a particular fact to a third person, and then the party is bound by what that person says or does upon the matter. *Williams v. Innes* (a), *Daniel v. Pitt* (b). [*Parke*, B.—According to the report, the learned Judge does not appear to have treated the finding as conclusive, but seems to have left it to the jury.] It was left to the jury, and they have found in favour of the plaintiff.

Goulburn, Serjt., and *M. D. Hill*, *contrà*.—The cases which have been cited were in *assumpsit*, and are therefore distinguishable from the present case, which is in *tort*, and relates to the possession of certain land. This was the verdict of a jury, and was not admissible in evidence. Suppose, in an action of trespass, the question was whether *A.* was in possession of a particular close, and it was proved that *A.* had said, if *B.*, *C.*, and *D.* say I am, I will pay, would what they said be evidence of *A.*'s possession? [*Parke*, B.—According to the opinion of Lord *Ellenborough*, the reference to the third person makes him his agent. This is like the admission of a fact

(a) 1 Camp. 364.

(b) Ibid. 365, note.

by an agent: it is, in truth, nothing more than the declaration of these persons in writing as to a particular fact.] It is nevertheless a *determination* as to that fact in writing: it is not an agreement; but, if any thing, it is an award. But even if it be an agreement by the defendant to pay the damage if the jury say he is in the possession of the shaft, it ought to have been specially declared on. In the cases which have been cited, the matter was referred to a person having a peculiar knowledge on the subject; but here the persons to whom this matter was referred had no previous knowledge of the fact to be determined. [*Parke, B.*—That can make no difference. If the party thinks that they had a knowledge, or means of obtaining information, it is the same thing. *Alderson, B.*, referred to *Price v. Hollis (a)*.—Is there any difference between the opinion of counsel and this decision of these persons?] Every thing in the nature of an award must have the incidents of an award, and, being in writing, it must be stamped. [*Alderson, B.*—There would be a difficulty in so considering it, as there is no recital of the submission.] The plaintiff is seeking to use it as a written award on a parol submission. No case where there has been a parol submission can be brought within the Stamp Act, if this is not. In the cases cited, there was a person having a peculiar knowledge of the fact, and he was referred to on that ground. If those cases are not distinguishable on that ground, they would be bad law, as his judgment would be an award. [*Bolland, B.*—Lord *Ellenborough*, in *Rust v. Palmer (b)*, states the rule to be, that, where a reference is made to a third person to settle and adjust an account or business, what he says, if it is connected with the business which is referred to him, is evidence. But he afterwards carried that further in *Daniel v. Pitt*; for he says, according to the report in *Peake's Additional Cases (c)*,

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(a) 1 M. & Selw. 105.

(b) 5 Esp. 145.

(c) P. 238.

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that, where there is a reference to the evidence of another, the party is bound by that person's declaration.]

That goes upon the doctrine of principal and agent, but a judge or an arbitrator is not an agent.

They then proceeded to argue on the effect of the finding, taking it to be admissible.

PARKE, B.—I am of opinion that this rule ought to be discharged. If the verdict had been for a larger sum, so that we could have granted a new trial on payment of costs, I should have concurred in doing so; because, looking at all the facts in the case, I do not think it was proved that the defendant was in the possession of the shaft; and if so, he was not responsible for this damage. But we are not at liberty so to grant it consistently with the rules of this Court, the verdict being for a sum under 20*l*. Then, looking at the report of the learned Judge, it does not appear that there was any improper reception of evidence, or any misdirection, taking the whole of the summing up together. The question has been raised, whether the verdict of the miners' jury was receivable in evidence. Two objections have been made to it. First, that it is no evidence at all to prove that the defendant was in possession of the shaft. But I am of opinion, that, coupled with the evidence of what the defendant had said, both before and after the verdict, it was evidence of that fact. Suppose the defendant alone had said, that, provided the miners' jury should be of opinion that the shaft was his, he would pay for the damage, such declaration of their opinion would have been evidence, according to the principle of the cases that have been cited, which make the declarations of the persons referred to equivalent to a party's own admission. The conversation too in the present case related to the very subject of the fall of the horse down the shaft. Therefore, without the concurrence of the plaintiff, the simple fact of the defendant's using these expressions would have had the same effect as if he

had himself made an admission. The jury are in the nature of his accredited agents. But in this case there was the concurrence of the plaintiff, and both parties agreed to abide by the decision of the jury. And the paper produced was in the nature of an award between them. The second objection is, that it ought to have been stamped. But the award stamp is only to be imposed on those instruments which on their face purport to be awards, which this does not. If two persons agree to refer a case to counsel, and to be bound by his opinion, if the opinion does not contain the evidence of the agreement, it is not liable to an award stamp. So also, to take an extreme case, suppose two persons to agree that a third person should decide a particular fact in dispute by putting a mark on a piece of paper. If he did put a mark on it, the paper would not appear to be an award, and would not require a stamp. Neither does the verdict of the jury in this case. Then, as to the misdirection, that is disposed of by the Judge's report of the whole summing up. It appears that he did not treat the verdict as conclusive, which would have been wrong, but left the question as to the possession of the shaft to the jury, on the whole of the evidence.

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BOLLAND, B., and ALDERSON, B., concurred, expressing their regret that they could not grant a new trial, as the verdict was for a sum under 20*l*.

Rule discharged.

PIGGOTT v. BIRTLES and Another.

CASE.—The first count of the declaration alleged that the plaintiff had distrained the cattle, goods, chattels, and growing crops of the plaintiff, to wit, horses, ploughs, &c.

A landlord is liable to some damages, in an action on the case for an excessive distress,

where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, in replevying the crops.

An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises besides growing crops.

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were any objection to the date of the writ in the writ of trial, the defendant ought to have applied before the trial to compel the plaintiff to insert the true date, and that it was now too late to do so.

Greenwood, contra.—In *Braithwaite v. Lord Montford* the alterations were made before the service of the writ, which distinguishes it from the present case. As to the observation that since the new rules the writ of trial is conclusive of the date of the writ of summons, it is apprehended that it is open to the defendant to shew the time when it actually issued. In *Wilton v. Girdlestone* (a), a bill against an attorney was filed of *Michaelmas* Term, and it appeared by the memorandum on the record to have been filed on the 28th of *November*; and it was held, that evidence was admissible to shew that it was actually filed on the 24th of *December*. [*Alderson, B.*—There the bill was filed as of *Michaelmas* Term. There could not then be any proceedings as of the vacation.] He also cited *Granger v. George* (b). [*Parke, B.*—The rule was refused on this point, and the Court was of opinion that there was no doubt that the writ of trial could not be contradicted. The time was stated in the form of the writ in order to prevent all question of it at the trial.] He then contended that the alteration having been made after the first writ had been served, the resealing was the time from which it was to date; and cited *Miller v. Miller* (c), and *Glenn v. Wilks* (d).

LORD ABINGER, C. B.—There must either be a stet processus, if the parties will agree to it, or the plaintiff must amend the record by substituting the 19th of *December* for the 24th of *November*.

The parties acceded to a stet processus.

(a) 5 B & Adol. 847.

(c) 2 Bing. N.C. 66; 2 Scott, 117.

(b) 7 D. & R. 729; 5 B. & C. 149.

(d) 4 Dowl. P. C. 322.

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SYBRAY v. WHITE.

CASE.—The declaration stated that the plaintiff was possessed of a certain close called the *Bean Croft*, in the county of *Derby*, and of a mare of great value, to wit, &c., which was depasturing in the said close; and that the defendant was possessed of a certain lead mine called *Ox Close Mine*, and of a shaft in the said close leading and belonging to the said mine; by means whereof he the said defendant ought to have kept the said shaft well and securely fenced round, to prevent cattle depasturing in the said close from falling into the said shaft; yet that the said defendant, not regarding &c., suffered and permitted the said shaft to be and remain open, whereby the said mare of the said plaintiff fell down the same, and was thereby killed. The defendant pleaded, *first*, that he was not possessed of the said lead mine; *secondly*, that he was not bound to keep the shaft covered.

At the trial before *Gaselee, J.*, at the last *Summer Assizes* for the county of *Derby*, it was proved that the plaintiff was possessed of the close mentioned in the declaration, in which there was a shaft leading to a mine, which had been covered up for many years. The top of the shaft, however, gave way under his mare, and she fell down it and was killed. The defendant, who was a miner, had been possessed of a lead mine in the *Ox Close*, and the plaintiff contended that the shaft belonged to his mine. This was denied; but the plaintiff and the defendant met, and the defendant, after denying that the shaft was his, said that if a miners' jury were called, and they said the shaft was his, he would pay for the mare. The premises in question were situate within the wapentake of *Wirksworth*, and in that district there is a court called the barmote court, which is held before the barmaster and a jury

A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miners' jury were called, and they should say that the shaft was his, he would pay for the horse. A miners' jury was accordingly called, and they found in writing that the shaft was his:—*Held*, that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case to recover compensation for the loss of the horse.

Held, also, that as the document in question

did not, on the face of it, appear to be an award, it need not be stamped as an award.

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consisting nominally of twenty-four miners from the district, but not necessarily of so many persons. The great barmote courts are held regularly every half year, but they may be called out on occasions when required. In this case the plaintiff applied to the barmaster, and desired him to call out a jury, which he did. The jury, consisting of five miners, examined the premises, and determined that the shaft in question belonged to the defendant; which determination they gave in writing. The following is a copy of the proceedings:—

“ Gentlemen of the Jury,

“ You are requested to look over certain lands in the township of *W. and S.*, called *Ox Close* and *Bean Croft*, and to examine the range of the mines, shafts, veins, and meers of ground given away by the barmaster for mineral uses. Copies from the barmaster’s books will be laid before you, and such other information as required, from which you are requested to declare in writing who are the owners of the aforesaid shafts, veins, &c.; and may the God of all wisdom direct you right.

“ *Joseph Sybray.*”

“ *Worksworth* soak
and wapentake,
Dec. 27. 1833.

“ We whose names are hereunder written, being five of the grand jury of twenty-four, and being this day summoned to a certain mine called *Ox Close* and *Beas Croft*, lying and being in the liberty of *Matlock* and wapentake aforesaid, and there having received a bill from Mr. *J. Sybray, &c.*,

“ In answer to the said bill, we have examined the range of the mines, shafts, veins, and meers of ground, as given away *March 15, 1822*, and *September 23, 1824*, by *Francis Hursthouse*, barmaster to *Benjamin White*, and consolidated together as one title, according to the copies produced from the barmaster’s book, *Michael Carding*

24 man. *Anthony Knowles* says that he remembers houses standing upon a hillock in a bush in the *Bean Croft* marked with *O. C.* and *L.*, standing for *Ox Close* and *Lee Wood*. *Mr. Milner* says their right and title was given away by the barmaster and 24. *Mr. G. Tessington* says that the first and second gift was consolidated together as one title. *Mr. J. Hursthouse* says that the gift was consolidated together as by the last evidence ; and it is our opinion that the mines, shafts, veins, and meers of ground lying and being in the *Ox Close* and *Bean Croft* belong to *Benjamin White* and partners. As witness our hands,

“ *William Walker,* *John Taylor,*
 “ *Robert Shaw,* *James Marshall.*”
 “ *Godfrey Taylor,*

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This was offered in evidence on the part of the plaintiff, but was objected to, as being either an award, and therefore subject to a stamp, which it had not, or a species of verdict given by a court, and then the proceedings were not properly established. The learned Judge, however, admitted it. The defendant gave evidence to negative his being in possession of the shaft, or that it belonged to his mine, and also shewed that he was dissatisfied with the result of the first inquiry of the jury, and refused to abide by it, and summoned another jury ; which, however, the plaintiff refused to attend ; but the second determination was in favour of the defendant. The defendant's documents, relating to this latter finding, were similar to those above set forth. The learned Judge put it to the jury to say whether the shaft did or did not belong to the defendant's mine ; stating, however, that he thought the defendant was concluded by his assenting to the inquiry by the first jury, and their finding. The jury found a verdict for the plaintiff, damages 15*l.*, saying that they thought the shaft did belong to the defendant.

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Goulburn, Serjt., in *Michaelmas* Term last, obtained a rule to shew cause why there should not be a new trial, on the ground that the finding of the miners' jury was not admissible in evidence; stating that the learned Judge had told the jury that such finding was conclusive.

Balguy and *N. R. Clarke* now shewed cause.—It is said that the finding of the jury is an award only, and that it was not admissible without a stamp. But this is not an award; it amounts to an admission by the defendant of his liability. He agrees to leave the matter to the jury, and says that if they find the shaft to be his, he will then pay for the loss of the mare. The jury afterwards find that the shaft belongs to him, and then he says, I suppose I must pay. This was in the nature of a reference of a particular fact to a third person, and then the party is bound by what that person says or does upon the matter. *Williams v. Innes* (a), *Daniel v. Pitt* (b). [*Parke*, B.—According to the report, the learned Judge does not appear to have treated the finding as conclusive, but seems to have left it to the jury.] It was left to the jury, and they have found in favour of the plaintiff.

Goulburn, Serjt., and *M. D. Hill*, *contrà*.—The cases which have been cited were in *assumpsit*, and are therefore distinguishable from the present case, which is in *tort*, and relates to the possession of certain land. This was the verdict of a jury, and was not admissible in evidence. Suppose, in an action of trespass, the question was whether *A.* was in possession of a particular close, and it was proved that *A.* had said, if *B.*, *C.*, and *D.* say I am, I will pay, would what they said be evidence of *A.*'s possession? [*Parke*, B.—According to the opinion of Lord *Ellenborough*, the reference to the third person makes him his agent. This is like the admission of a fact

(a) 1 Camp. 364.

(b) Ibid. 365, note.

by an agent : it is, in truth, nothing more than the declaration of these persons in writing as to a particular fact.] It is nevertheless a *determination* as to that fact in writing : it is not an agreement ; but, if any thing, it is an award. But even if it be an agreement by the defendant to pay the damage if the jury say he is in the possession of the shaft, it ought to have been specially declared on. In the cases which have been cited, the matter was referred to a person having a peculiar knowledge on the subject ; but here the persons to whom this matter was referred had no previous knowledge of the fact to be determined. [*Parke, B.*—That can make no difference. If the party thinks that they had a knowledge, or means of obtaining information, it is the same thing. *Alderson, B.*, referred to *Price v. Hollis (a)*.—Is there any difference between the opinion of counsel and this decision of these persons ?] Every thing in the nature of an award must have the incidents of an award, and, being in writing, it must be stamped. [*Alderson, B.*—There would be a difficulty in so considering it, as there is no recital of the submission.] The plaintiff is seeking to use it as a written award on a parol submission. No case where there has been a parol submission can be brought within the Stamp Act, if this is not. In the cases cited, there was a person having a peculiar knowledge of the fact, and he was referred to on that ground. If those cases are not distinguishable on that ground, they would be bad law, as his judgment would be an award. [*Bolland, B.*—Lord *Ellenborough*, in *Rust v. Palmer (b)*, states the rule to be, that, where a reference is made to a third person to settle and adjust an account or business, what he says, if it is connected with the business which is referred to him, is evidence. But he afterwards carried that further in *Daniel v. Pitt* ; for he says, according to the report in *Peake's Additional Cases (c)*,

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(a) 1 M. & Selw. 105.

(b) 5 Esp. 145.

(c) P. 238.

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that, where there is a reference to the evidence of another, the party is bound by that person's declaration.]

That goes upon the doctrine of principal and agent, but a judge or an arbitrator is not an agent.

They then proceeded to argue on the effect of the finding, taking it to be admissible.

PARKE, B.—I am of opinion that this rule ought to be discharged. If the verdict had been for a larger sum, so that we could have granted a new trial on payment of costs, I should have concurred in doing so; because, looking at all the facts in the case, I do not think it was proved that the defendant was in the possession of the shaft; and if so, he was not responsible for this damage. But we are not at liberty so to grant it consistently with the rules of this Court, the verdict being for a sum under 20*l*. Then, looking at the report of the learned Judge, it does not appear that there was any improper reception of evidence, or any misdirection, taking the whole of the summing up together. The question has been raised, whether the verdict of the miners' jury was receivable in evidence. Two objections have been made to it. First, that it is no evidence at all to prove that the defendant was in possession of the shaft. But I am of opinion, that, coupled with the evidence of what the defendant had said, both before and after the verdict, it was evidence of that fact. Suppose the defendant alone had said, that, provided the miners' jury should be of opinion that the shaft was his, he would pay for the damage, such declaration of their opinion would have been evidence, according to the principle of the cases that have been cited, which make the declarations of the persons referred to equivalent to a party's own admission. The conversation too in the present case related to the very subject of the fall of the horse down the shaft. Therefore, without the concurrence of the plaintiff, the simple fact of the defendant's using these expressions would have had the same effect as if he

had himself made an admission. The jury are in the nature of his accredited agents. But in this case there was the concurrence of the plaintiff, and both parties agreed to abide by the decision of the jury. And the paper produced was in the nature of an award between them. The second objection is, that it ought to have been stamped. But the award stamp is only to be imposed on those instruments which on their face purport to be awards, which this does not. If two persons agree to refer a case to counsel, and to be bound by his opinion, if the opinion does not contain the evidence of the agreement, it is not liable to an award stamp. So also, to take an extreme case, suppose two persons to agree that a third person should decide a particular fact in dispute by putting a mark on a piece of paper. If he did put a mark on it, the paper would not appear to be an award, and would not require a stamp. Neither does the verdict of the jury in this case. Then, as to the misdirection, that is disposed of by the Judge's report of the whole summing up. It appears that he did not treat the verdict as conclusive, which would have been wrong, but left the question as to the possession of the shaft to the jury, on the whole of the evidence.

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BOLLAND, B., and ALDERSON, B., concurred, expressing their regret that they could not grant a new trial, as the verdict was for a sum under 20*l*.

Rule discharged.

PIGGOTT v. BIRTLES and Another.

CASE.—The first count of the declaration alleged that the plaintiff had distrained the cattle, goods, chattels, and growing crops of the plaintiff, to wit, horses, ploughs, &c.

A landlord is liable to some damages, in an action on the case for an excessive distress,

where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, in replevying the crops.

An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises besides growing crops.

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&c., and fifty acres of wheat growing on the plaintiff's land, for more rent than was due. The second count was for taking and distraining beasts of the plough, there being other cattle, goods, and chattels on the premises sufficient to satisfy the rent due without them. The third, fourth, and fifth counts were for certain alleged irregularities in the taking of the distress; on which the defendants succeeded at the trial, and which became now immaterial. The sixth count was for distraining when no rent was due. The seventh count alleged that on the 27th of *March*, 1835, the defendants had distrained, and taken the goods and chattels of the plaintiff, and also his growing crops of wheat, which would have been more than sufficient to cover all the arrears of rent then due, and the costs of taking the distress; that they sold the goods and chattels, but retained possession of the growing crops, on which the distress still continued, and that the same when ripe would be of more than sufficient value to satisfy all the deficiencies on the sale of the goods, and to satisfy the arrears of rent, and the charges of the distress; yet that the said defendants, on the 2nd of *April*, in the year aforesaid, wrongfully and vexatiously made a second distress upon the goods and chattels of the plaintiff for the same arrears of rent. The eighth and ninth counts were for certain alleged irregularities in the second distress. The tenth count was in trover.

The defendants pleaded not guilty to all the counts except the seventh, and various other pleas, in substance alleging that rent was in arrear, and that there was no sufficient distress on the premises without taking the beasts of the plough. To the seventh count, the defendants pleaded payment into Court of the sum of 60*l.*, and no damages *ultra*: to which the plaintiff replied, taking issue on the sufficiency.

At the trial before *Williams*, J., at the last *Summer Assizes* for the county of *Salop*, it appeared that the plaintiff was tenant to the defendant *Birtles* of a farm;

that, on the 25th of *March*, 1835, half a year's rent, amounting to 142*l.* 10*s.*, became due in respect thereof; and that, on the 27th, the defendant put in a distress, and seized all the plaintiff's cattle, including beasts of the plough, and certain of his moveable goods and chattels, and also distrained the wheat crops which were then growing on the farm. The cattle and goods were sold by auction, and did not produce sufficient to satisfy the arrears of rent due. On the 2nd of *April* following, the defendants, without relinquishing the distress on the growing crops, made a second distress, and took other goods, which were sold, but did not raise sufficient to satisfy the arrears of rent due to the landlord. At the trial, the plaintiff contended, that if, at the time of the first distress, the growing crops had been valued, there would have been enough to satisfy the arrears then due, without taking the beasts of the plough, and consequently that the defendants were not justified in taking them; and that the second distress was altogether unjustifiable on the same ground. The defendants insisted that the growing crops were not a subject of valuation at the time they were taken, and that they were justified in taking the beasts of the plough, and in making the second distress. The learned Judge left it to the jury to say, whether, on the 27th of *March*, the growing crops were of any value, and if they were, whether they were of so much value as to make the first or second distress excessive. The jury found that they at that time were capable of being valued, and were of so much value as to make both distresses excessive, and gave a verdict for the plaintiff, with 100*l.* damages. The learned Judge, however, gave the defendants leave to move to enter a verdict for the defendants, if the Court should be of opinion that the growing crops ought not to have been taken into consideration. *Ludlow*, Serjt., having accordingly, in *Michaelmas* Term last, obtained a rule to enter a verdict for the defendants on the issue raised upon the first, second, and sixth counts of the declaration,

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Talfourd, Serjt., and *Whateley*, in *Hilary Term*, shewed cause.—The proposition on the other side goes to this extent, that the growing crops could not be taken into the consideration of the jury *at all*, even though the other goods on the premises might amount to within the smallest possible sum of satisfying the whole rent and expenses. It may perhaps be admitted, that the verdict on the sixth count cannot be supported. But the defendant having by his pleas expressly tendered issues on the question whether the growing crops were, with the other goods, of sufficient value to satisfy the distress, has no right, when the finding of the jury is against him on that point, to say that it could not form a subject of their consideration, and therefore that he is entitled to a verdict. He ought to have demurred to the declaration, if the growing crops were improperly introduced into it. Whether they were or were not susceptible of any valuation when taken, is a question most properly for the consideration of a jury. There can be no doubt they are ordinarily the subject of sale. Doubtless, they are subject to damage which may destroy their value altogether; but numberless things are the subject of sale, which are also the subjects of speculation, and exposed to the risk of damage. Growing crops are seizable in execution, and are continually so sold. The whole difficulty in truth arises from confounding *value* and *appraisement*. They certainly could not be appraised until they were ripe. It was not, however, until the statute of 2 *W. & M.*, sess. 1, c. 5, that goods distrained for rent were to be appraised at all; but the action for an excessive distress was given long before, by the statute of *Marlbridge*, 52 *Hen. 3*, c. 4. Until the passing of the former act, therefore, no question about appraisement could be raised. And the appraisement often forms no sort of guide as to the excess of the distress, the want of it furnishing ground for nominal damages only. The appraisement itself is no evidence for the defendant to shew the value of the goods; for that purpose the

appraisers must be called, and must put their value on the things taken like any other competent persons. It may be observed also, that, under the 11 Geo. 2, c. 19, s. 27, there must be some estimate taken of the value, as well of the growing crops as of the other goods seized, for the purpose of ascertaining the amount in which the replevin bond is to be taken. The defendants however must contend, that, in estimating the value, the growing crops are to be regarded as nothing whatever. If so, it is not easy to see why the landlord should be permitted to seize them as being of some value. The tenant, moreover, must replevy the whole of the things seized. But the growing crops may be of so great a value, that if they are all to be taken as well as the goods, it may amount to saying that there shall be no replevin, because it would be impossible for him to find such security. Again, the sheriff must continue in possession for four or five successive months, at the tenant's expense, and that although the rest of the goods may be sufficient within 5*l*. to satisfy the distress. If the crops are appraisable for one purpose, they ought, to avoid such gross injustice, to be so for another. The other question, which arises on the second count of the declaration, furnishes a striking illustration of the fallacy of the argument on the other side. It must be said,—the landlord may take all the goods and all the crops on the farm; but, because the crops are to be rejected as capable of no present value, he may take also all the beasts of the plough, there not being without them a sufficient distress. So that all the proceedings of the farm, of whatever kind, may be stopped, and all the produce taken away. That is a result which the law can hardly be construed to sanction.

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Ludlow, Serjt., and Busby, contra.—This was not an excessive distress. It is similar to the cases in the old books, where things are taken which are incapable of

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severance, as a cart and horses, or a flock of sheep in a fold. *Clarke v. Tucker* (a). If there be any one thing which is uncertain as to the value, growing crops are so, and no real actual value can be put upon them. The landlord could not ascertain their value, except by speculation, since they are exposed to all the risks of the weather and the seasons, and may be destroyed before they are ripe, and prove of no value at all. As between an outgoing and incoming tenant they may be valued, but that is by special agreement between them. The landlord cannot appraise them, or cut them, until they are ripe. The 23rd section of the 11 *Geo. 2*, c. 19, respecting the taking of replevin bonds, applies only to goods and chattels, which these are not. *Miller v. Green* (b). Then, what damage has the tenant sustained? All that the landlord has done is to prevent their being taken away, by placing them under his lien. He cannot sell them until they are ripe; and no replevin was necessary; *Owen v. Legh* (c). The tenant may redeem them by paying the arrears of rent due. All that he is precluded from doing is, the suffering them to be taken in execution under a *fiери facias*. With regard to what has been said, that the objection appears on the record, there is no foundation for that argument; for the defendant in his plea only follows the language of the declaration, and says that the goods and chattels, and beasts of the plough, were not of sufficient value; and, if the growing crops were of no value at the time of the distress, the taking of them could make no difference.

Cur. adv. vult.

The judgment of the Court was now delivered by—
PARKE, B.—Two questions remained for consideration in this case, which were discussed on shewing cause

(a) 2 Ventris, 183.

(b) 2 C. & J. 142.

(c) 3 B. & Ald. 470.

against a rule to enter a verdict for the defendant on the first, second, and sixth counts of the declaration, upon a point reserved by my Brother *Williams*:—*First*, whether a landlord be liable, in point of law, to an action on the case for an excessive distress, where the excess consists wholly in taking growing crops, the probable produce of which is capable of being estimated at the time of seizure; and, *secondly*, whether he be liable to a similar action for seizing beasts of the plough as a distress for rent, there having been at the time a sufficient distress on the land demised, if growing crops are to be included for this purpose. The other points in the cause were disposed of, either on the trial or on the argument: these were reserved for consideration on account of their novelty and importance.

The two questions differ from each other, and the Court have had much more difficulty in disposing of the first than the second, and we have entertained considerable doubts upon the subject; but in the result, we are of opinion that an action will lie for the excessive distress to recover *some* damages; but that an action is not maintainable for distraining beasts of the plough, under the circumstances of the case.

The common law right of a landlord to distrain for rent service appears to be restricted *at common law* to the taking of a *reasonable* distress. So Lord Coke intimates in his reading on the statute of *Marlbridge*, c. 4, 2 *Inst.* 107, which statute, he there says, “agreeth with the reason of the common law.” But whether the duty to make a reasonable distress be created by the common law or by the statute, an action will equally lie, if there be a breach of that duty, and damage thereby arise to the person on whose goods the distress is made. At common law, and when the statute of *Marlbridge* passed, a distress could be made only upon moveable chattels, being upon the land demised, and such as were capable,

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after they had been detained for an unlimited time as a pledge, of being restored in the same plight and condition to the distrainee; and the damage which was sustained by the latter, by an excessive distress, was the loss of the use and enjoyment of the surplus of such goods, which were removed and impounded off his land, for such time as he was deprived of it; and if not restored before action brought, then probably he might claim the full value of such surplus. When the common law right of the landlord was extended to other chattels of the like description, that is, capable of being removed and impounded off the premises, cattle or stock for instance upon commons appendant or appurtenant to the demised lands, the inconvenience to the distrainee being precisely of the same nature, doubtless he would be entitled to the same remedy. But the statute law has created some new distrainable subjects, which are not to be treated in the same way as those which are distrainable at common law; one class of which, though of a moveable nature, is not allowed to be removed at all, and another is of an immoveable quality at the time of the distress, and both of which are ultimately to be disposed of in a way entirely different from that prescribed by the common law. One of those subjects is corn loose or in the straw, or in sheaves or cocks, or hay, which by the statute *2 Will. & Mary*, sess. 1, c. 5, s. 3, may be secured, locked up, and detained in the place *where found*, in the nature of a distress, until replevied, and in default of replevying, *must*, it should seem, be *sold* in five days, and cannot be removed: and this species of subject of distress differs from that at common law, in respect of its being legally both incapable of removal, and of being kept for an indefinite period, till payment of the rent. Another of these subjects is growing corn, or other product, which by *11 Geo. 2*, c. 19, may be distrained, but cannot be disposed of until after it has become ripe and been cut, which must be afterwards

placed in barns or other proper place on the demised premises, and cannot then be removed from the premises except *sub modo*, that is, in default of there being such a proper place; and this new subject *must*, as it seems, be then *sold*; so that it differs entirely from the common law subjects of distress.

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The question then arises, whether both or either of these new distrainable subjects be within the principle of the common law or the Statute of *Marlbridge*, so that the distrainer is to be liable if he takes an unreasonable quantity of such subjects, either alone or jointly with other chattels; and we think that they are. The duty of taking a reasonable quantity, which the law casts on the distrainer, cannot be varied by this extension of his powers: if he takes more, he exceeds his duty; and if damage is caused thereby to the distrainee, it seems to be inconsistent to say that he shall not have a remedy, because, from the change in the mode of treating the subject of distress, the nature of the damage is changed. If there be a breach of duty, and damage thereby, the case falls within the established principle, though the quantum of compensation will of course vary, if the damage be less.

Does the distrainee, then, sustain damage by the act of the distrainer in taking too large a quantity either of corn or hay loose, or growing crops? It seems to us that he does in both cases. In the former, he is deprived of the power, for a limited time, of making use of the corn or hay for his cattle, or disposing of it freely at the market; or he is exposed to the inconvenience of procuring sureties in a replevin bond to a larger amount, if he chooses to replevy and to regain the full dominion over his property; and it may be that an additional expense for securing the distress is cast upon him by this unnecessary addition to the chattels distrained, for he must ultimately pay whatever reasonable expense is incurred by the landlord. In the latter case, that of a distress of growing crops, he is deprived

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of the power of selling and receiving the money to his own use, with respect to all the surplus which the landlord has unreasonably taken. He cannot feed off, or cut his crops whilst green for fodder or sale; he may also be exposed to additional expense in the keeping the distress, for the statute 11 Geo. 2, c. 19, s. 19, provides that if the tenant pay to the landlord, *before* the crops are ripe, cut, and gathered, all the rent, and costs and charges of making the distress, and which shall have *been occasioned thereby*, the distress shall cease. It is therefore clear that the law contemplates that in a distress of a growing crop, *some* other expense will be occasioned to the landlord than that of making the distress. Such would be the case if the tender was made at a late period of preparing for or beginning harvest, which might be greater to the landlord than to the tenant; and the cost of looking after the crops to prevent their being damaged by trespassers, or improperly abstracted by the tenant, which would be incurred from the earliest time. These expenses the tenant would ultimately have to pay; and he could not be relieved from the accruing liability to pay them, or restored to the full dominion over his growing crops, without the inconvenience of replevying, and being bound, if he replevies, to give security to double the full value, being a greater amount than he would have done if a proper distress had been taken. These are *inconveniences* to a tenant from taking too large a distress, though they vary much in degree, and in most cases would be almost nominal; but, if there be *any* damage, the action we think will lie. One mode of illustrating the principle is by putting an extreme case, as suggested at the bar. Suppose, for an arrear of 5*l.*, the growing crops on a thousand acres of land were distrained in *March*, and the tenant thereby prevented from dealing with the crops by selling them on his own account, or cutting them, or feeding them off by cattle, if he chose, from thence to the following harvest time—it could not be

said that the quantity taken was not greater than it ought to have been, or that the tenant had sustained no damage. The principle is the same as the present, and the inconvenience differs only in degree.

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For these reasons we think that the plaintiff was entitled to a verdict on the first count; but not for the full value of the crops beyond the amount which ought to have been taken, upon which principle the jury appear to have given their verdict. The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession: and some compensation for the loss of the absolute ownership and power of disposition for the same time: or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a larger amount. It cannot be contended that the probable value of the crops is to be taken as a present satisfaction of the rent to that amount, so as to make the landlord a wrongdoer, by taking and selling all, or, as the case may be, the excess of moveable chattels, and liable for their value; for he has a right to apply those which are *immediately* productive in satisfaction of the rent *pro tanto*, and hold a reasonable part of the present unproductive fund, as a security for the balance. We therefore think that the jury have given excessive damages; and unless, by mutual agreement, they can be reduced to a sum nearly nominal, there ought to be a new trial.

The second question is, whether the landlord can be liable to an action on the case for taking and selling beasts of the plough, when there was another sufficient distress on the land demised, but such sufficient distress included growing crops, and without those crops there was no sufficient distress. We are clearly of opinion, that he is not liable in this case; for the landlord has a right to resort to the subjects of distress which are *immediately* available

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to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period. If there are other moveable chattels, to the amount of the rent and expenses, besides *averia carucæ*, he would not be justifiable in taking the latter; but if there are not, he has a right to take and sell all or so many of the beasts of the plough as may be necessary with the other moveable and saleable chattels, to satisfy the arrears and charges. We therefore think the verdict on the second count should be entered for the defendant, and it is conceded by the plaintiff that on the sixth count the defendant is entitled to a verdict.

Rule accordingly.

WELLS v. ODY.

The Building Act, 14 Geo. 3, c. 78, s. 43, which authorizes the building or raising of a party-fence wall, does not protect a party from liability for any collateral damage resulting from the building so erected; and an action on the case is maintainable by the occupier of an adjoining house, for heightening and building on a party-fence wall, whereby his windows were darkened.

CASE.—The declaration stated, that the plaintiff was possessed of a certain messuage or dwelling-house, situate &c., and carried on therein the trade of a coffin-maker, in which messuage were divers ancient windows, through which the light ought to enter; and that the defendant, intending to injure the plaintiff in the enjoyment of the said messuage, theretofore, to wit, on the 1st day of *April*, 1834, and on divers other days and times, &c., wrongfully erected and built a certain building, to wit, a workshop, near to the windows of the said plaintiff in his said messuage, and kept and continued the said erection and building so as aforesaid built for a long space of time, &c. And also on the 1st day of *April*, 1835, kept and continued a certain other building near to the windows of the said plaintiff in his said messuage. By means of which said grievances he, the said plaintiff, was prevented from using his said messuage as he otherwise could have done: concluding with averring that, in consequence thereof, a lodger in the house had given notice to quit.

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Plea, not guilty. At the trial before *Parke*, B., at the *Middlesex* Sittings after last *Hilary* Term, it appeared that the defendant had raised a party-fence wall, which divided the premises of the plaintiff and defendant, situate in *Drury Court, Strand*, and had built a workshop and a stable, up to and upon the wall so raised, which had the effect of darkening the plaintiff's windows. There had been a former action brought in trespass (a), but as it appeared that the defendant had acted *bond fide* under the authority of the Building Act, 14 *Geo.* 3, c. 78, and the plaintiff had given no notice of action pursuant to the 100th section of that act, the plaintiff was nonsuited. This action was now brought in case for a continuance of the erection. A notice of action had been given, which was objected to, as it stated that an action would be commenced "forthwith," and not 21 days after notice; but this did not now become material. The defendant insisted that he was protected by the provisions of the Building Act, inasmuch as by the 100th section of that act, the action is required to be brought within six months from the time of the act committed, and here a longer period had elapsed before the commencement of the suit, and therefore he was not liable to this action. This objection was however overruled. The defendant further insisted, that as this building was partly on the plaintiff's land, the action ought to have been trespass, and not case. The learned Judge left this question to the jury, whether the plaintiff's enjoyment of the light and air was diminished to a greater degree than it would have been if the building had been erected on the defendant's moiety of the wall only. The jury found in the negative. A verdict was then taken for the plaintiff, with liberty to move to enter a nonsuit.

Kelly having obtained a rule accordingly,

(a) See 2 C. M. & R. 128.

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Bompas, Serjt., Humfrey, and Barstow, now shewed cause.—The first question is, whether the defendant is protected by the Building Act, 14 *Geo. 3*, c. 78, s. 43. It is thereby enacted, “that any party-fence wall now built, or hereafter to be built, may be raised by and at the expense of the proprietor or occupier of the ground on either side adjoining thereto; but no party-fence wall shall hereafter be built upon or against, or used as a party-wall, unless the same be of the materials, height, and thickness, hereinbefore directed for party-walls, to the rate or class of buildings so to be erected against or upon the same. And in case of the insufficiency of such wall for the purposes aforesaid, or if, instead of such party-fence wall, there be only a wooden fence, the proprietor or occupier of either of the adjoining premises shall be at liberty, at his own expense, to take down such wall or fence, and erect a new party-wall in lieu thereof, making good every damage that may accrue to the adjoining premises by such rebuilding; so, nevertheless, as that such new party-wall shall not extend on the surface of such adjoining ground more than seven inches beyond the centre line of such party-fence wall or fence; but no proprietor or occupier of such adjoining premises, shall make use of such party-wall otherwise than as a party-fence wall, unless he, she, or they, pay a proportionable share of the whole expense of erecting such parts of such wall, according to the use he, she, or they shall make of the same, at the rates aforesaid.” The object of that enactment is, that by having substantial separations between the houses, injuries by fire might be prevented; but it was not intended to protect the party from the collateral consequences resulting from his building the new party-wall; and there is nothing which shews any intention in the legislature to alter or interfere with the private rights of the parties in other respects, as to whether the building is a nuisance or not. The statute only gives to persons a right to go on the moiety of another party, in doing certain acts, which

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at common law they were not at liberty to do, but it leaves them still liable for all collateral injuries which result from their act. The act provides also that surveyors shall be appointed; but their duty is only to see that the wall is of a sufficient thickness, not to see whether the party erects a building on that wall which is a nuisance to his neighbour. There is no clause which provides anything with respect to the collateral rights of the parties; but the act says, that if the party is entitled to build the wall, he may go on the premises of other parties to build one moiety of it. The 100th section protects a person for anything done in pursuance of, and by the authority of, the act, but it cannot apply to collateral injuries, and to protect persons who avail themselves of the provisions of the act to commit other wrongs. [*Parke, B.*—The act of Parliament does not enable a man to darken his neighbour's lights. Trespass will not lie, because, so far as respects the mere act of building on the plaintiff's wall is concerned, the statute authorizes him to do so.] The case of *Titterton v. Conyers* (a) differs in circumstances, but the principle laid down by the Judges is the same, and may be considered as having determined this point. In that case it was decided that the Building Act has not destroyed the right to lateral windows which existed before that act. *Gibbs, C. J.*, there says, "we are clearly of opinion that, notwithstanding the Building Act, the plaintiff's right to his lateral lights remained." The principle is, that the act is not intended to interfere with the collateral rights of the parties.

The second objection was to the form of the action. The defendant, admitting that the Building Act does not protect him, contends that an action on the case is not maintainable, because the injury which is complained of is in consequence of an act which is in part a trespass.

(a) 5 Taunt. 465.

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But there is no force in that argument, as this is one of those injuries for which the party has the option of two remedies—either to bring case or trespass. There are many cases in which it has been held that a party may waive the direct tort, and bring an action for the consequential damage which he has sustained, as in *Branscomb v. Bridges* (a) and *Smith v. Goodwin* (b). (Another objection was, that assuming this proceeding to be protected by the Building Act, though not justified by it, yet the action ought to have been brought within three months, pursuant to the 100th section; and *Wordsworth v. Harley* (c), *Roberts v. Read* (d), *Sutton v. Clarke* (e), and *Lord Oakley v. The Kensington Canal Company* (f), were cited; but as the Court did not come to any decision as to this objection, it has been thought proper to omit the argument.)

Kelly, Adolphus, and R. V. Richards, contra.—The action is misconceived. The real grievance complained of is, that the defendant has laid bricks and other incumbrances on the plaintiff's land, which is a direct trespass, and the subject of an action of trespass; and it is immaterial whether the wall is continued or not, and the plaintiff's lights have been thereby obstructed. The jury have found, in substance, that the obstruction to the plaintiff's lights is as great from the part built on the plaintiff's moiety of the wall as from the whole; so, if the wall built on the defendant's moiety were pulled down, and the other moiety only left, the building of which was clearly an act of trespass, the injury complained of would still remain. Suppose the plaintiff pulled down the moiety of the wall on his own land, then an injury might arise from the wall on the defendant's moiety: but that is not complained of

(a) 1 B. & Cr. 145; 2 D. & R. 256.

(b) 4 B. & Ad. 413; 1 Nev. & Man. 371.

(c) 1 B. & Ad. 391.

(d) 16 East, 215.

(e) 1 Marsh. 429.

(f) 5 B. & Ad. 138.

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in this action. It is not disputed that the act done is the subject of an action of trespass, but the plaintiff contends that the defendant is liable in case, for an abuse of this parliamentary licence. Even if that be so, the declaration should have been specially framed, that by abuse of the privileges of the act the injury was done. The defendant would then have known what charges he had to meet. But there is no such distinction as that contended for. Either the act done is justified by the statute, or it still remains a trespass according to the nature of the injury. Suppose the statute gave a clear authority to do the act on the land of another, and the defendant exceeded his authority, the plaintiff must bring trespass. The building of this wall does not make the plaintiff and defendant joint-tenants of it; and therefore the defendant has no right to go on the plaintiff's land and pull down the part of the wall which stands on the plaintiff's moiety. If he did, he would subject himself to an action of trespass, *Matts v. Hawkins* (a); and that shews that trespass is the proper form of action for an injury committed on the plaintiff's land. [*Parke, B.*—You must not assume that trespass is the only form of action. There is a case in *Com. Dig. Action on the Case for a Nuisance, A.*, where it was held that such an action lies for a nuisance to the habitation or estate of another: as if a man build a house hanging over the house of another, whereby the rain falls upon it.] The contrary appears to have been decided in *Pickering v. Rudd* (b). [*Parke, B.*—No; that point was not decided (c). It was thought by Lord *Ellenborough* to be a very nice question, whether trespass was maintainable.]

(a) 5 Taunt. 20.

(b) 1 Stark. N. P. C. 56.

(c) The marginal note is as follows:—"A. erects a board, which projects over B.'s land, at a con-

siderable distance from the surface, and occasions inconvenience to B. *Quære*—whether B.'s remedy is by action of trespass, or an action on the case?"

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Secondly, the defendant was protected by the Building Act in building this wall, and he was fully justified in so doing. The defendant was empowered by the forty-third section to raise the wall, and if in so doing he commits any injury, it is but exceeding the authority given him. Suppose the defendant had built beyond the limit of seven inches on the plaintiff's land, would that have altered the form of action? The moment the party begins to raise the party-fence wall, although it is protected by the statute, yet still it is a trespass. The placing of bricks on a person's land is a trespass; the continuing them there is also a trespass. As the Building Act authorizes the raising of the wall, it by necessary implication justifies the consequential injury which arises therefrom. If the wall is not protected by the statute, it would be a good replication to say it was an illegal wall, so far as respected the obstruction of the windows. [*Parke, B.*—Supposing this building to have been erected, and that it afterwards, and after the period of the limitation of action had elapsed, became a nuisance by an offensive trade being carried on in the building, would the plaintiff be without remedy? Is not that a strong illustration to shew that the statute does not apply to authorize collateral injuries which result from the building of the wall?]*—On the third objection, as to the limitation of time, they cited Pratt v. Hillman (a), Lloyd v. Wigney (b), and Wordsworth v. Harley (c).*

LORD ABINGER, C. B.—The finding of the jury raises the principal doubt in this case.—The action is one brought by the plaintiff for a nuisance in obstructing his lights. The first answer to the action was, that the building was erected partly on the property of the plaintiff; and the jury have found that the obstruction is as great from the building on the plaintiff's soil as from that on the

(a) 4 B. & Cr. 269; 6 D. & R.
360.

(b) 6 Bing. 489; 4 M. & P. 222.

(c) 1 B. & Ad. 391.

defendant's soil also. It is said that the action should have been trespass. No case has been cited to shew, that where an injury has been done, partly by an act of trespass, and partly by that which is not an act of trespass, but the subject of an action on the case, the plaintiff is bound to adopt one or the other form of action. I can see no reason which prevents the present form of action from being resorted to, that would not be equally applicable to an action of trespass. If the argument be good for anything, that an action on the case cannot be maintained, by parity of reasoning an action of trespass could not: so that it would prove that the plaintiff is not entitled to maintain any action. I should have thought that the plaintiff might bring either action, case, or trespass. Suppose a person to be affected in the enjoyment of a water-course by the erection of a weir, partly placed on his own land and partly on his neighbour's: that which was placed on his own land would be the subject of an action of trespass. If the acts be both done at the same time, and there be a common injury, it seems to me the plaintiff may bring either case or trespass, alleging the common damage. There are not wanting analogies to shew, that where there is a common injury, there may be a common remedy, and a party may adopt either; as in the cases of nuisances, where the act is committed in one county, and the effect is produced in another, the venue may be laid in either. However specious the argument which has been urged, it will not bear investigation; but the result is, that the party might have brought either form of action. It has however been argued, that the plaintiff could not have sustained any injury from the portion of the wall built on the defendant's soil, and that this is inferred from the verdict of the jury. But that was not their meaning; it could not be the case, unless the part of the wall on the defendant's soil were transparent. They did not mean that the injury to the plaintiff was not equally affected by the part on the

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defendant's soil as by that on the plaintiff's. A second objection was, that the injury complained of is justified by the Building Act, or if not, that the defendant is protected by the limitation of time, and by the want of due notice of action. Neither of these objections can be maintained. The Building Act was intended to prevent any action of trespass or case from being brought against a person for doing the precise things which are authorized by that act to be done, and was not intended to apply to cases not contemplated by the act, nor to collateral transactions, but to the injuries naturally and immediately arising from the acts of the parties. If there be any direct or incidental injury, a notice may be required, and the protection afforded by the statute would apply. That might be the case of a private injury, resulting from something required to be done by the act. The party would bring an action of trespass, and if the defendant were to justify under the Building Act, the plaintiff might reply that he had done something not justified by that act, and therefore had become a trespasser *ab initio*; as if the act required the wall to be raised to a certain height only, and the party raised it higher, he would be a trespasser *ab initio*. In this particular case, where the party-fence wall is raised, the act prescribes no limit, but the legislature wished to give the party the right of doing with his neighbour's wall what he might otherwise legally have done with his own; therefore, the act justifies that trespass, but not the collateral consequences resulting from it. If an injury result directly from the act, the party is justified; but if a nuisance result from it, that is a collateral injury, and is not justified by it, and a notice of action is not required. Suppose a party to raise a fence-wall, and build a chimney in it, and kindle a fire in it, whereby a nuisance is created, after the three months have elapsed, is the neighbour prevented from bringing his action? It is said that it might have been brought when the chimney was erected; but there

was no cause of action until the furnace was lighted, and the smoke created. Those acts, indeed, which are the necessary and immediate consequences of the act done under the Building Act may be justified under it, as they may be the subject of a precise action; but not such consequential injuries as the present.

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PARKE, B.—I entirely concur with the Lord Chief Baron. The first question is, whether this is a case within the Building Act at all, so as to be justifiable under the general issue. The second is, whether, supposing it to be so, the defendant is protected by the limitation of action and the want of notice? I am disposed to agree that the cause of action does date from the first act of trespass, but that it runs on with the continuance of the injury. But the present case is not within the Building Act; it is clearly out of the purview of it. The object of that act was the preservation of the houses of this city from fire. (His Lordship here read the 43rd section.) The legislature intended to enable any person to make a more complete party-wall, and therefore gave him liberty to do that which, but for that act, he would have no right to do, having in view to secure the general protection of property. By allowing the owner of one moiety to treat the whole as his own, subject to a provision as to the materials to be used, the object of the legislature is effected. The party is left to all the consequences of the act, and no reference is made to the eventual damage which may be caused by that wall. That appears to have been wholly out of the contemplation of the legislature. If it turns out that what has been done was unnecessary, it is not within the Building Act; so, if the wall be built so high as to create a nuisance, it is not within it. It is not necessary, therefore, to consider from what time the cause of action accrues, or the form of the notice. But then comes the question, is an action on the case maintainable? and it is contended that it is not, on two grounds.

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The first is clearly put, that this is an act not capable of severance. It appears to me that the plaintiff has an option as to the form of action, and the more natural remedy is an action on the case. Besides the instance mentioned by the Lord Chief Baron, which is a case where the plaintiff necessarily has an option of bringing the action in the one county or another, either in that where the cause of the nuisance is erected, or in that where the injury takes place, there are other instances in which an action of trespass or on the case may be brought; as where damage is done to a carriage, which is occasioned by an immediate act of carelessness, the plaintiff may bring trespass or case; *Moreton v. Hardern* (a), *Williams v. Holland* (b). Again, another is mentioned in *Com. Dig., Action upon the Case for a Nuisance, A*, where a man builds a house overhanging another's, so that the rain falls upon it, an action on the case is maintainable. Here, the act of the projection is itself a trespass, yet the old authorities lay it down that case may be brought: and though the act of the building on the joint wall was in part a trespass, yet, as the effect of the act altogether was to deprive the plaintiff of his light, he was justified in bringing an action on the case. So in the instance put by the Lord Chief Baron of the weir, as the effect is that the plaintiff is disturbed in the enjoyment of his watercourse, he may bring an action on the case, though a trespass contributed to the injury. I think an action on the case is more appropriate, though probably an action of trespass might have been maintained. But the ground of complaint is, that the defendant has used his own property so as to injure his neighbour, and has abused the parliamentary privilege of raising the fence-wall to the detriment of another. This is not a case where the plaintiff could have received compensation in an action for the trespass in building the wall.

(a) 4 B. & C. 223; 6 D. & R.
275.

(b) 10 Bing. 112; 3 M. & Scott,
540.

BOLLAND, B.—I shall confine my observations to one point only, and that is, whether the defendant is within the provisions of the Building Act. Now, the 43rd section was introduced solely with the view of protecting the buildings in the metropolis, and it consists of two branches. In the first it directs how the party-walls shall be mechanically constructed; and from that part of the clause it appears that where there is a party-fence wall, the proprietor of one part may build upon the whole wall, but in so doing he must be regulated by the directions given in the act. The section then goes on to provide that he is not to extend the party-wall beyond a certain space; and then the clause provides for the enjoyment of the party-wall, and requires that the person who is desirous of using it should pay part of the expenses incurred in building it. So that it appears to me that the directions in the section are confined to the regulation of the structure and enjoyment of the wall, but there is no provision for the injury which may result from the building in any other way.

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Rule discharged.

RICHARDSON and Wife v. ROBERTSON.

ASSUMPSIT for money had and received. Plea, *non assumpsit*. At the trial before Lord Abinger, C. B., at the *London* Sittings after last *Hilary* Term, the plaintiffs proved an acknowledgment by the defendant that he had in his hands the sum of 100*l.* belonging to the plaintiffs. The defendant offered to prove in reduction of damages, that since the action was commenced he had paid 50*l.* to the plaintiff's wife. The Lord Chief Baron was of

Where it appeared that a sum of money had been paid to the plaintiff after action brought, and there was no plea of payment, the Court, on motion, the payment not being denied, allowed the damages to be

reduced by that sum. *Quære*, whether payment either before or after action brought is admissible in evidence in reduction of damages?

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opinion that the evidence was inadmissible, and refused to receive it, but gave the defendant's counsel leave to move to reduce the damages if the Court should be of opinion that it ought to have been received.

Steer obtained a rule accordingly, against which

Hoggins now shewed cause.—The rule of *Hilary* Term, 4 *Will.* 4, Assumpsit No. 3, requires that payment shall be pleaded, and the word “payment” means payment before action brought. The 17th Rule, as to the payment of money into court, applies to cases where money is paid into court after the action has been commenced, and requires that it shall be pleaded in bar of the further maintenance of the action. That might have been done in the present case.

LORD ABINGER, C. B.—This is not a motion for a new trial, but to reduce the amount of the verdict by the sum which has been paid, and which payment is not denied. The Court think that the payment should have been pleaded according to the strict rule of pleading; but as the payment is not denied, we think the verdict may be reduced.

PARKE, B.—The same reasoning which allows the admission of evidence of payment before action brought, applies to the case of payment after the action has been commenced. It has been decided (a) that evidence of the former may be given, though not specially pleaded; whether rightly or not is another question. The Judges certainly concurred in the ruling of Lord *Denman*, C. J., at *Nisi Prius* in *Lediard v. Boucher* (b).

ALDERSON, B.—The Court give no opinion upon the point raised as to the right of giving payment in evidence

(a) See *Shirley v. Jacobs*, 2 Bing. N. C. 88. (b) 7 Car. & P. 1.

to reduce the damages. This case is decided on its particular circumstances.

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FORBES v. CROW.

IN this case a notice of trial had been given for the Sittings in *London* on the 23rd of *April*; but the plaintiff, not being prepared for trial, gave notice of trial by continuance to the next Sittings, two days only before the former Sittings.

The notice of trial by continuance must be given the same length of time before the notice of trial expires as in the case of a notice of countermand.

On a former day in this term *Petersdorff* obtained a rule for the costs of the day for not proceeding to trial, on the ground that the notice of continuance was insufficient. He moved on an affidavit, stating that the defendant and his witnesses resided more than forty miles from *London*.

Humfrey shewed cause.—All the books of practice lay it down that two days' notice of continuance is sufficient; and they do not take any distinction as to cases where the parties reside above forty miles from *London*. Undoubtedly, where there is a notice of countermand, the rule is, that where the parties reside above forty miles from *London*, there must be six days notice.

Per Curiam.—The Master informs us that there is that distinction which has been alluded to, and there is no reason why there should be any difference in the practice between the notice of continuance and the notice of countermand. It ought to be put on the same footing as the notice of countermand, and it must be understood in future that the same notice shall be required for both.

The rule was discharged, the defendant's costs to be costs in the cause.

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HUTTON *v.* WARREN, Clerk.

A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it,—is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it.

ASSUMPSIT.—The declaration stated, that the plaintiff, on the 25th of *March*, 1833, became tenant to the defendant, who then was rector of the parish of *Wroot*, in the county of *Lincoln*, of a certain farm, glebe land, premises, and tithes, with the appurtenances, situate in the said parish, upon the terms and conditions that the plaintiff, his executors, administrators, or assigns, should and would during the said tenancy manage, till, sow, and cultivate the said farm, &c., in a husbandlike manner, according to the custom of the country, and that the defendant should, after the expiration of the said tenancy, make and pay to the plaintiff all such reasonable allowances as the plaintiff, as off-going tenant, should, according to the custom of the country, be entitled to receive from the defendant in respect of any tillage, sowing, or cultivation of the said farm, &c. according to the custom of the country. The declaration then averred mutual promises, and proceeded to allege that the plaintiff continued such tenant until the 25th of *March*, 1834, when the said tenancy was determined by notice from the defendant to quit the farm: that the plaintiff, during the said tenancy, to wit, on the first of *February*, 1833, and on other days, &c., according to the course of good husbandry, and in tilling, &c. the said farm according to the custom of the country, bestowed his work and labour, and used seeds and corn in sowing divers parts of the said farm, &c. with barley, blend-corn, and clover, and other seeds, and also bestowed his work and labour in cultivating the said barley, &c., until the determination of the said tenancy, and was by the determination thereof prevented from enjoying the crops arising from the said barley, &c.; and the plaintiff, according to the custom of the country, was, as off-going tenant, entitled to

certain fair, reasonable, and customary allowances in respect of such tillage &c., amounting in the whole to the sum of 99*l.* 7*s.* 6*d.*; yet the defendant would not pay the same, &c.

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Pleas—*first, non-assumpsit*; *secondly*, that the plaintiff was not tenant to the defendant on the terms and conditions in the declaration mentioned; *thirdly*, that the plaintiff, according to good husbandry, and in tilling &c. according to the custom of the country, did not bestow his work or labour, or use any seed or corn, &c., or bestow his work or labour on the said barley &c., *modo et formâ*; *fourthly*, that the plaintiff, according to the custom of the country, was not entitled as off-going tenant, &c.: on all which issues were joined.

At the trial before *Gaselee, J.*, at the last *Summer Assizes* for the county of *Lincoln*, it appeared that the plaintiff took the farm, which consisted of the parsonage-house and glebe of the parish of *Wroot*, in the year 1811, by lease from *Dr. Warren*, the then incumbent, the father of the defendant, at a rent of 150*l.*, and had occupied it ever since, until he quitted it as hereafter mentioned. In *October, 1832*, *Dr. Warren* resigned the living, and the defendant was presented to it. At *Michaelmas, 1833*, the defendant gave the plaintiff notice to quit at the *Lady Day* following; and in the following *October* an interview took place between the plaintiff and defendant, and the attorney of the latter, when there was a discussion as to the plaintiff's sowing a particular field, and whether he was to be allowed for the crop. The defendant and his attorney insisted that the plaintiff was bound by the custom of the country to sow it, and to keep the farm in regular course; and a formal notice was accordingly given to the plaintiff by the defendant's attorney, a few days afterwards, not to neglect to cultivate the farm in due course of husbandry, according to the custom of the country. The plaintiff quitted, pursuant to the notice,

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at *Lady Day*, 1834. It was proved, that according to the custom of the country, a tenant was bound to cultivate the farm according to a certain course of husbandry, and was entitled, on quitting, to a fair allowance for seeds and labour on the arable land, and was bound to leave the manure on the land, if the landlord chose to purchase it; and a land-valuer, who had been employed by the defendant in 1833 to value the plaintiff's tenant-right, stated that the farm was cultivated according to the due course of husbandry, and valued the allowance to be made to him at the sum of 95*l.* 17*s.* 6½*d.* For the defendant, witnesses having been first called for the purpose of shewing that the custom did not apply to glebe land, that no tenant was entitled, by the custom, to off-going allowances, who had not paid them on coming in, and that the valuation made by the plaintiff's witness was much too high; the lease under which the plaintiff originally occupied was put in; it was dated 2nd *January*, 1811, and was a demise for six years, to commence at *Lady Day* following, of the parsonage-house and glebe land, and the tithes of the whole parish of *Wroot*, at an annual rent of 150*l.* for the house and land, and 200*l.* for the tithes; to be void on the death, resignation, &c., of the lessor; and contained covenants by the plaintiff, that, at the end or other sooner determination of the term, he should quit, yield, and deliver up the premises in good order and condition to the lessor and his successors, "and also should spend and consume three parts in four of the hay and straw arising from the said glebe land and tithes so demised as aforesaid, upon the said glebe land, and spread and bestow the compost or manure arising therefrom or thereby upon the said glebe land, or some part or parts thereof, and should leave such part of such compost or manure as should not be so spread or bestowed on the said premises at the end or other sooner determination of the said term, upon the said premises, to and for the use of the said *J. W.* or

his successors, he or his successors paying a reasonable price for the same." It was contended that the effect of this latter stipulation was to exclude the custom of the country as to the allowances on quitting. The learned Judge reserved the point, and a verdict was found for the plaintiff for 95*l.* 17*s.* 6½*d.*

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In *Michaelmas* Term, *Balguy* obtained a rule *nisi* for a nonsuit, pursuant to the leave reserved ; against which, in the present term,

Humfrey and *Waddington* shewed cause.—*First*, the plaintiff is not now bound by the stipulations of the lease at all. The defendant is no party to it ; and although, when a tenant holds on after the expiration of a lease under the same party by whom the lease was granted, he holds on the terms of the lease, so far as they are applicable, that does not apply to a case like the present, where the lease had expired long before the relation of landlord and tenant commenced between *these* parties. At all events, the lease is only *prima facie* evidence of the contract, and may be rebutted by the conduct of the parties. Here, the evidence shews that the parties have themselves construed the terms on which they were going on as being governed by the custom of the country, and that the lease was not considered as defining the terms of their contract. And the course taken by the defendant on the trial shews the same ; for he did not resort to the lease until he had reason to believe that his attempts to shew the non-applicability of the custom in the particular case would not avail him. If the defendant, when he gave the plaintiff notice to cultivate according to the custom, did believe that he was holding under the lease, his conduct was grossly fraudulent.

But, *secondly*, the custom is not excluded, but is perfectly consistent with the stipulations of the lease. Parol

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evidence is admissible to introduce the custom as part of the contract between the parties, in all cases except where, either in express terms, or by necessary implication, the covenants in the lease exclude the custom. Now here there is one covenant only relating to the terms of quitting or the manner of cultivation, and that of a very limited nature, viz. the stipulation that the tenant shall consume three-fourths of the hay and straw on the land, and spread the manure arising from it, and leave such as shall not be so spread at the end of the term on the premises for the lessor, he paying a reasonable price for it. If this covenant excludes the custom, no terms of *cultivation* at all are imposed on the tenant, except as to consuming the hay and straw upon the land. If the custom is to be held excluded, it must be held to be a mutual and reciprocal exclusion of all that either party was bound to do under the custom. Therefore, the plaintiff was not bound to cultivate in a husbandlike manner, for no such covenant is to be founded in the lease. And the argument goes to this extent, that, if there be the slightest stipulation in the lease for any payment to be received by the tenant, though it be one not referring at all to the mode of cultivation, that excludes all other allowances for every thing done in the due course of husbandry. There is no case which furnishes an authority for such a conclusion, although the *dictum* of Bayley, J., in *Webb v. Plummer* (a), that “where the lease specifies *any* of the terms of quitting, we must then go by the lease alone,” may appear to go so far: but it is submitted that that *dictum* must be thus qualified;—that where the tenant covenants to do certain things, and there follow stipulations for allowances as to some of those things, it thence follows as a consequence that he is not to have allowances for the others. To make this case like *Webb v. Plummer*, the lease should have contained

(a) 2 B. & Ald. 750.

a covenant by the tenant to sow the land in the last year, and to leave the manure, and then a stipulation that he should be paid for the manure only. Here there is no stipulation to cultivate in any particular way, so as to produce any manure. *Senior v. Armitage* (a) was precisely the converse of the present case. There, the lease stipulated that the manure should be used on the farm, and left at the end of the term, *without* payment; and the custom of the country for the landlord to make the tenant a reasonable compensation for labour, tillage, sowing, and materials, to be provided in the away-going year, was held not to be excluded. That case appears, indeed, to go to the extent that the custom applies, unless it is excluded by express words. [*Alderson*, B.—Is that good law to that extent now?] It is not necessary to contend that it is. [*Parke*, B.—In *Webb v. Plummer*, Mr. Justice *Bayley*, if his recollection was accurate, seems to have supposed that the stipulation as to leaving manure had nothing to do with the terms of quitting; for he says the lease in *Senior v. Armitage* was wholly silent as to the terms of quitting.] That construction reconciles the two cases. The principle stated by Lord *Mansfield* in *Wigglesworth v. Dallison* (b), is applicable—"The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking." [*Alderson*, B.—Could the tenant have been sued for not cultivating according to the custom?] It is submitted that he could, according to the principle laid down by Lord *Mansfield*. [*Alderson*, B.—The reason given by him, "that the custom of a particular place may rectify what would otherwise be imprudence or folly," would apply as well to *varying* the lease as to *supplying* it.] *Holding v. Pigott* (c) is another authority in favour of the plaintiff. In *Roberts v. Barker* (d), as in *Webb v. Plum-*

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(a) Holt's N. P. C. 197.

(b) Dougl. 201.

(c) 5 Moo & P. 427; 7 Bing. 465.

(d) 1 C. & M. 808.

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mer, there was a stipulation in the lease applying directly to the same subject-matter to which the custom applied.

Balguy and Miller, contra.—*First*, the plaintiff was holding under the defendant on the terms of the lease. There was no evidence of any new contract on the expiration of the lease in 1817, or on the resignation of the lessor; the parties, therefore, must be taken at both these periods to have continued on the terms of the original contract entered into by the lease. It is said, that the conversation proved to have taken place after the notice to quit, was evidence of a new contract that the plaintiff should hold on the terms of the custom of the country. But that was no more than an intimation to the plaintiff that he was not to leave the land waste; an obligation which the very relation of landlord and tenant imposed upon him, without reference to the custom. If there had been no specific contract, he could not have done that. [*Parke, B.*—He could, if he chose; it is not waste at common law, either wilful or permissive, to leave the land uncultivated. In order to oblige him to farm according to good husbandry, you must have either some express contract, or some implied contract from the custom of the country.] The notice, at all events, meant no more than what is always understood between landlord and tenant as being the duty of the latter.

Then, with regard to the other point; it may be considered as if it arose between the original parties to the lease. To entitle himself to these allowances as against the original lessor, the plaintiff ought to have expressly stipulated for them; if he omits to do so, but does stipulate for others, *Webb v. Plummer* is a distinct authority that he cannot claim them. But it is said there was no stipulation in this lease as to the terms of quitting. But surely

the covenant as to leaving the manure for the use of the landlord is one of the terms of quitting, though there might be many others. The parties are contemplating the expiration of the tenancy, and what is *then* to be done between them with respect to the manure. The mention of that, therefore, according to *Webb v. Plummer*, is a virtual exclusion of every other stipulation referring to the expiration of the tenancy. *Bayley, J.*, in that case, says without qualification—"If a lease speaks distinctly of the allowances to be made upon quitting, it seems to me to exclude all others which are not named." *Holroyd, J.*, expresses himself to the same effect. The only possible inference from that case is, that, where any one or more terms on which the parties are to separate are introduced into the lease, the introduction of them is an exclusion of all others. *Senior v. Armitage* does not apply; here the stipulation in question is in accordance with the custom, not in breach of it. [*Parke, B.*—No; it applies only to three-fourths of the manure.] The observation of Lord *Lyndhurst, C. B.*, in *Roberts v. Barker (a)*, applies to the present case—that "if the parties meant to be governed by the custom in any respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it." That case much resembles the present in its circumstances, and was also, like this, the case of a party holding on the terms of an expired lease.

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PARKE, B.—We will take some time to consider this case, and will endeavour to obtain a fuller account of the decision in *Senior v. Armitage*. It is very important to lay down the rule with clearness if we can.

Cur. adv. vult.

(a) 1 C. & M. 810.

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In this term the judgment of the Court was delivered by

PARKE, B. (After stating the pleadings, he continued :) —It appeared on the trial that the plaintiff took the farm of the late incumbent, the father of the defendant, on the 2nd of *January*, 1811, by a lease under seal, comprising the tithes of the parish also, at the rent of 150*l.* for the farm, and 200*l.* for the tithes, payable at *Michaelmas* and *Lady Day*, for the term of six years from *Lady Day*, 1811, if the lessor should so long continue incumbent. The plaintiff occupied until *October*, 1832, when the incumbent resigned, and the defendant, his son, succeeded him in the living. The plaintiff continued to occupy the farm and tithes, paying the same rent, at the same times, until *Lady Day*, 1834, when he quitted, in pursuance of a notice given to him by the defendant; and he claimed in this action the allowances for seed and labour due to the off-going tenant by the custom of the country.

The defendant resisted the claim, on the ground that he held under the terms of the written lease, and that by those he was not entitled to any such allowances.

It was proved, that, by the custom of the country, a tenant was bound to farm according to a certain course of husbandry for the whole of his tenancy, and at quitting was entitled to a fair allowance for seed and labour on the arable land; and was obliged to leave the manure, if the landlord would purchase it.

In *October*, 1833, after the notice to quit, the defendant, his agent, and the plaintiff, had an interview, and the agent insisted that the plaintiff should sow the arable land, and that he was bound to keep the farm in regular course. The plaintiff accordingly did afterwards sow the arable land, for which he claimed the compensation in question.

Two points were made on the argument before us; *first*, whether the plaintiff was bound by the terms of the lease at all, after the resignation of the lessor; *secondly*,

whether, if he was, those terms excluded him from this claim. *Exch. of Pleas, 1836.*

Upon the first point we think that the plaintiff must be taken, in the absence of evidence to the contrary, to have held under the defendant on the same terms that he held under his father, so far as those terms were applicable to a tenancy from year to year. No evidence was given to the contrary on the trial, and indeed this objection does not appear to have been there raised on the part of the plaintiff.

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The second question requires some consideration. The custom of the country as to cultivation and the terms of quitting with respect to allowances for seed and labour, is clearly applicable to a tenancy from year to year; and therefore if this custom was, by implication, imported into the lease, the plaintiff and defendant were bound by it after the lease expired.

We are of opinion that this custom was, by implication, imported into the lease.

It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not

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altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed.

The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the Courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.

Accordingly, in *Wigglesworth v. Dallison*, afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord *Mansfield* said that the custom did not alter or contradict the lease, but only superadded something to it.

This question subsequently came under the consideration of the Court of *King's Bench* in the case of *Senior v. Armitage*, reported in *Mr. Holt's Nisi Prius Cases*. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour under the denomination of tenant-right, Mr. Justice *Bayley*, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The Court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that, though there was a written contract between landlord and tenant, the custom of the country would be still binding, *if not inconsistent* with the terms of such written contract; and that, not only all common-law obligations, but those imposed by custom, were in full force where the contract *did not vary them*. Mr. *Holt* appears to have stated the case too strongly

when he said that the Court held the custom to be operative, “ unless the agreement *in express terms* excluded it ; ” and probably he has not been quite accurate as attributing a similar opinion to the Lord Chief Baron *Thompson*, who presided on the second trial. It would appear that the Court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

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On the second trial, the Lord Chief Baron *Thompson* held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it or left at the end of the tenancy, *without* any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

The next reported case on this subject is that of *Webb v. Plummer*, in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm ; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground, and thrashing the corn. The claim was for a customary allowance for *foldage*, (a mode of manuring the ground), but the Court held, that, as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, *and no more*.

The question then is, whether, from the terms of the

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lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour.

The only clause relating to the management of the farm (except the covenant to repair) is one which stipulated that the plaintiff shall spend and consume on the farm three-fourths of the hay and straw arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the term for the use of the landlord, on paying a reasonable price for the same. This provision introduces and has a principal reference to a subject to which the custom of the country does not apply at all, namely, the tithes, and imposes a new obligation on the tenant *dehors* that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration, by re-purchasing a part of the produce in a particular event. It is by no means to be inferred from this provision that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting *for the ploughing*, or to plough, sow, and manure, he being paid *for the manuring*, the principle of *expressum facit cessare tacitum*, which governed the decision in *Webb v. Plummer*, would have applied; but that is not the case here. The custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend.

We are therefore of opinion that the plaintiff is entitled to recover, and the rule must be discharged.

Rule discharged.

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LANGTON v. VINEY.

CHANDLESS had obtained a rule to set aside an attachment issued against the sheriff in this cause, on payment of costs. On cause being shewn by *J. Jervis*, the only question discussed was, whether the bail-bond should stand as a security or not; and the rule was made absolute, the bail-bond to stand as a security.

Where, on shewing cause against a rule for setting aside an attachment against the sheriff on payment of costs, the only question made was, whether the bail-bond should stand as a security, and the Court made the rule absolute with that term, but the plaintiff subsequently discovered that an error had been made in the dates, and that he was not entitled to have the bail-bond stand as a security:—*Held*, that he could not then urge a formal objection to the affidavits on which the rule was obtained.

Jervis now stated that it was in consequence of an error as to the dates that the Court had been led to conclude that the plaintiff had lost a trial, and that he could not now contend that the bail-bond ought to stand as a security: but he applied to have the rule discharged, on the ground that the affidavits on which it was obtained were improperly intitled; and he cited *Clothier v. Ess* (a) as an authority that such an objection was not waived by the appearing to oppose the rule on the merits, and using affidavits in opposition.

ALDERSON, B.—Here it was considered on all hands that the rule was to be absolute, and the only matter discussed was, whether it was to be on the terms of the bail-bond standing as a security. Surely you cannot after that go into a matter which has no reference to the terms on which the rule is to be made absolute, but it is to prevent its being made absolute at all.

Per Curiam.—This objection is too late.

Rule absolute.

(a) 3 Moo. & Sc. 216; 2 Dowl. P. C. 731.

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In *assumpsit*, the first count of the declaration was on an undertaking by the defendant to pay such costs, charges, and expenses, as the plaintiff (an attorney) should incur in an action to be brought by him against *G.* on a bill of exchange drawn by the defendant on *G.*, which was lying due, and which the plaintiff had agreed to take up for the honour of the defendant. In the second count the plaintiff declared as indorsee of the bill; the third was for money paid; the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate is-

sue was, whether a bill subsequently given by the defendant to the plaintiff was given in satisfaction of the first, or as a collateral security.

The plaintiff first gave a particular of demand applicable only to the count on the bill of exchange. The defendant obtained an order for particulars "of the bill of costs, charges, and expenses mentioned in the first count of the declaration:" and the plaintiff thereupon delivered a particular, containing a copy of his whole bill of costs in the action against *G.*, and also the amount of the bill and interest. At the trial, the Judge ruled that the costs out of pocket only could be recovered on the first count:—*Held*, that the particulars were sufficient to enable the plaintiff to recover the rest of the bill of costs under the account stated.

The defendant gave in evidence, for the purpose of proving that the second bill was given by way of satisfaction, an unsigned account of the plaintiff's claims, which had been delivered by him to the defendant for the purpose of their being proved under *G.*'s bankruptcy; and one item of which was the amount of the bill of costs:—*Held*, that this was not such evidence of an account stated as would have enabled the plaintiff to recover the costs on the account stated, if his particulars had been insufficient for that purpose.

ASSUMPSIT.—The first count of the declaration stated, that the defendant had drawn a bill of exchange for 30*l.* upon one *Guy*; that *Guy* had accepted it and indorsed it over; that the said bill was lying due at the Bank of *England*; and in consideration that the plaintiff would take it up, and pay the amount thereof for the honour of the defendant, and would sue *Guy* in his the plaintiff's name upon the bill, the defendant promised to pay him the amount of all such costs, charges, and expenses as he should incur, bear, sustain, and be put to, by reason of his commencing and prosecuting such action. The count then alleged, that the plaintiff did take up the bill and pay the amount for the honour of the defendant, and that he sued *Guy*, and incurred costs to the amount of 11*l.* 14*s.* 6*d.*; that then *Guy* became bankrupt, and neither he nor the defendant had paid that sum. In the second count the plaintiff declared as indorsee of the bill. There were also counts for money paid, and on an account stated.

The defendant pleaded to the first count, payment into court of 4*l.*, to which the plaintiff replied damages *ultra*. To the second count, that, after the bill became due, the defendant paid the sum of 14*l.* 16*s.* in part satisfaction thereof, and gave the plaintiff another bill for 16*l.* 6*s.*, drawn by one *Day* on one *Sabine*, accepted by him, and

indorsed by *Day* to the defendant, which bill was not due at the commencement of this action, in satisfaction of the residue. To this plea the plaintiff replied, that the said sum of 14*l.* 16*s.* was not paid as alleged in the plea, and that the plaintiff received the bill of exchange therein mentioned on the terms of its remaining in his hands as a security, and in consequence of his forbearing to proceed thereon until a certain day, before which the former bill was to have been paid; and that it was not paid before that day. The rejoinder denied that the latter bill was given on the terms mentioned in the replication.

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The plaintiff delivered, under a Judge's order, general particulars of demand as follows:—

“ The plaintiff seeks to recover the principal sum of 27*l.* 8*s.* 6*d.*, being the balance of the sum of 30*l.*, money paid and advanced by the plaintiff to take up a bill of exchange drawn by the defendant upon and accepted by one *W. H. Guy*, and a further sum for interest thereon to the day of payment or signing final judgment.”

The defendant took out a summons and obtained an order for particulars “ of the bill of costs, charges, and expenses mentioned in the first count of the declaration;” whereupon the plaintiff delivered a copy of his bill of costs in the action against *Guy*, amounting to 11*l.* 14*s.* 6*d.*; to which he added also the bill, 30*l.*, and four months' interest, 10*s.*, making in the whole 42*l.* 4*s.* 6*d.*

At the trial before Lord *Abinger*, C. B., at the *London* *Sittings* after *Hilary* Term, it was proved for the plaintiff that the defendant had requested him to take up the 30*l.* bill, and had promised to pay the costs of the action against *Guy*, if the plaintiff, who was an attorney, would sue *Guy* in his own name. Those costs amounted to 11*l.* 14*s.* 6*d.*, of which the costs out of pocket were 3*l.* 1*s.* 6*d.* After *Guy* became bankrupt, the defendant promised to pay the bill of costs, and made appointments for that purpose, but failed to do so. The Lord Chief Baron was of opinion,

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that, as the first count was framed, only the costs out of pocket could be recovered upon it; and they were covered by the money paid into court. The defendant proved payment to the plaintiff of the sum of 13*l.*, and the giving of the bill for 16*l.* 6*s.*; but there was a controversy between the parties as to the terms on which it was given. In order to shew that it was given in satisfaction, the defendant put in an account (not signed) delivered to him by the plaintiff for the purpose of proving the several payments made on account of the transaction under *Guy's* bankruptcy, in which it was so represented. The first item of that account was, "Costs to be paid, 11*l.* 14*s.* 6*d.*" The learned Judge left it to the jury to say, whether the second bill was given as payment or by way of collateral security; and they found that it was given as payment. His Lordship then stated that he thought there was sufficient evidence on the account stated to warrant the jury in giving a verdict for the plaintiff on that count for the balance of 7*l.* 4*s.* 6*d.* due in respect of the costs. A verdict was accordingly found for the plaintiff on the account stated, for that amount, and for the defendant on the other counts.

On a former day in this term, *Kelly* obtained a rule *nisi* to enter a verdict for the defendant on the account stated, or for a new trial, on the ground that the plaintiff's particulars were not so framed as to allow him to give any evidence of an account stated; the bill of costs furnished in the second particular being applicable only to the first count, as to which the plaintiff had been satisfied by the money paid into court.

Bompas, Serjt., and *W. H. Watson*, now shewed cause.—The plaintiff is entitled to retain his verdict on the account stated. The defendant had, by the particulars, substantial notice of *all* that the plaintiff sought to recover in

the action, *viz.* the balance due on the original bill, and the costs of the action against *Guy*, and could not have been misled. The particular first delivered clearly points to the count for money paid. The second, though it was delivered in consequence of the defendant's application for a particular of the costs, &c. "mentioned in the first count," is not itself limited in its terms to such charges as could be recovered under that count, but comprehends all the matters in respect of which the plaintiff could recover in the action—*viz.* his whole bill of costs, the bill of exchange, and the interest. The plaintiff more than obeyed the Judge's order, and furnished a statement, not of the costs merely, but of his whole demand. Unless, therefore, the effect of the particular was limited by the terms of the Judge's order, he has clearly a right to give evidence of his claim for costs under any count of the declaration. But it cannot be said that it was so limited. Particulars are not bound to such precision of terms as a declaration; all that is necessary is, that they shall be sufficiently plain as that the defendant cannot be misled by them. Thus, in *Harrison v. Wood* (a), *disbursements* were held recoverable under an item in a particular of demand, for "cash advanced." In *Lambirth v. Roff* (b), where the plaintiffs, who were spirit-merchants, delivered a bill of particulars for goods sold by them "in their trade of *brewers*" (the action being for spirits supplied to the defendant), the Court held that the variance was immaterial, inasmuch as the defendant could not have been misled by it. *Davis v. Edwards* (c), and *Brown v. Hodgson* (d), are authorities to the same effect. The latter case is strongly in point, for there the particular, if technically construed, applied to the first count of the declaration,

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(a) 8 Bing. 371 ; 1 M. & Scott, 597.
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(c) 3 M. & Sel. 380.

(b) Ibid. 411 ; 1 M. & Scott,

(d) 4 Taunt. 189.

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which was for goods sold and delivered; but the plaintiff was allowed to apply it to the other count for money paid.

But the defendant's own evidence, *viz.* the account put in by him, shews that he *knew* the plaintiff did not limit his claim to the first count, and at all events let in the cause of action on the account stated. *Hurst v. Watkins* (a) is an authority that, where it appears from the defendant's evidence that the plaintiff is entitled beyond the amount demanded by his particulars, he is no longer limited to that amount, but may recover anything beyond, to which his declaration applies. Here, the production by the defendant of the account delivered to him, shewed that the plaintiff had a good cause of action on the account stated. [*Parke, B.*—Does it shew anything more than that the plaintiff claimed 1*l.* 14*s.* 6*d.* for costs?] The defendant uses it as an *account stated* between them, and on which he has paid money on account, for the purpose of shewing that the plaintiff cannot recover on the second count. He cannot so use it for his own advantage without its being taken as an account stated on the other side also. By the same evidence whereby he defeats one cause of action, he sets up the other.

Kelly and Busby, contra.—The claim in this declaration is fourfold—*first*, that on the special count, which is a mere contract of indemnity; *secondly*, on the bill; *thirdly*, for money paid; and, *lastly*, on an account stated. The first particular was clearly confined to the claims on the bill, and for money paid. Then the defendant obtains an order specifically for a particular on the special count, and a particular is thereupon delivered of a regular bill of the costs claimed by the special count, and by that count only; and the defendant then pays 4*l.* into Court on that count alone. That payment shews that he was in fact misled by the particular: supposing it to apply exclusively to the first count, he pays in that amount on the

(a) 1 Camp. 68.

assumption that under that count, as framed, only the costs out of pocket could be recovered. If, then, the plaintiff may notwithstanding rely on an acknowledgment, and resort to the account stated, the defendant is clearly misled; he had no notice by either particular of any account stated. Nor was any question on the account stated mooted by the plaintiff at the trial; it was the suggestion of the learned Judge, and the evidence was not left to the jury as applicable to that count. *Hurst v. Watkins* has no application to this case. The paper put in by the defendant is in no sense an account stated; it shews no *balance*, but is merely a statement of all the money which the plaintiff alleges he has paid. If, indeed, rejecting all the other evidence in the cause, it is to be coupled with the evidence given for the plaintiff, it may so be made an account stated; but it is no evidence for the plaintiff when taken along with the other evidence *for the defendant*. His evidence alone raises no case for the plaintiff on the account stated; and the document itself shews that he did not know what the claim of the plaintiff was.

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LORD ABINGER, C. B.—If this case depended altogether on the point, whether the defendant himself furnished evidence for the plaintiff, I should hardly be disposed to go that length: that is at least ambiguous; the paper put in was not signed by any party, and no balance was struck; and to make it an account stated, we must combine it with the plaintiff's evidence. But the material question is, whether the defendant was misled by the particular. Now the second particular was not, as has been contended, a particular on the first count of the declaration only; the Judge's order is not for particulars on the first count, but for particulars of "the bill of costs, charges, and expenses, mentioned in the first count." Then the plaintiff, instead of delivering that only, puts

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into his bill of particulars all that he could recover on any of the counts. The defendant, therefore, had full notice of all the plaintiff sought to obtain, and he was not bound to abandon any part of it. If the plaintiff had gone on to say, "these are the particulars of the plaintiff's demand on the first count," that would have been mere surplusage, and would have left the whole equally open to him. Then, was the defendant deceived as to the amount the plaintiff meant to recover?—Clearly not. It may be that he was surprised at its being recovered on the account stated, but that is no ground for giving him any benefit. I have little doubt, that, having discovered the inaccuracy in the mode of stating the first count, the defendant was lying *perdue* to take advantage of that objection, and prevent the plaintiff's recovering more than the money paid into Court. The plaintiff, however, has not expressly abandoned any count of his declaration; and it appears to me that we shall do no injustice by, and are not prevented by any technicality from, coming to a conclusion in his favour on the question before us.

PARKE, B.—I am of the same opinion. The plaintiff certainly has not made out that the defendant has given evidence against himself. The rule laid down in *Hurst v. Watkins*, and to which I entirely assent, is only this—that the bill of particulars confines the plaintiff's evidence to the causes of action mentioned in the particulars; but that if the defendant, in giving evidence for himself, gives evidence also for the plaintiff of some claim not included in the particulars, the plaintiff, as to that claim, is no longer confined to the particulars, but may avail himself of the defendant's evidence. But my Brother *Bompas* has failed to satisfy me that any evidence was given by the defendant on the account stated. Undoubtedly there was evidence on the part of the plaintiff to go to the jury of an account stated; but the defendant's counsel did not require that that evidence should be left to the jury. The

only question at present, therefore, is on the effect of the particular. It is certainly very inartificially drawn, and the Judge's order is also untechnical and informal. The first order ought not to have been made so generally as it was, for the plaintiff was not compellable to give any particulars at all on the first and second counts. Then the defendant applies for an order for particulars of the bill of costs, &c. mentioned in the first count of the declaration, and the second particular is thereupon delivered. If the plaintiff had added to it, "I insist that I am entitled to recover the above on all the counts of the declaration," the particular would have been perfectly formal and technical; but it says in effect the same thing. The particular of the bill of costs includes not merely the costs out of pocket, which alone fell within the first count, but the whole costs out of the action. The case looks strongly as if the defendant had found out the form of the first count, taken advantage of it, and paid money into Court on that count only, and then made use of the paper in question (which had been given for an entirely different purpose) to turn the plaintiff round upon the other count. I have no doubt the defendant perfectly understood that the plaintiff meant to go for his whole bill, and not to confine himself to a claim on any particular count.

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BOLLAND, B.—I am of the same opinion. The true test is, whether the defendant was or could be misled. I think it is clear that he was not misled, but was himself endeavouring to mislead the plaintiff.

ALDERSON, B.—The defendant says that when he got the particular, he supposed the sum claimed was costs out of pocket; but the document he produces shews clearly to my mind that he did not so suppose, and therefore that he was not misled.

Rule discharged.

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STRONG v. DICKENSON.

The defendant, an attorney, was arrested at the *Auction Mart Coffee-house*, between two and three o'clock, p. m. The statement in his affidavit, in support of a motion for his discharge on the ground that he was privileged *eundo*, was, that having professional business in several cases to transact in this Court, he was proceeding through the city of *London*, on his way to *Westminster Hall* for that purpose, and on arriving at the *Bank of England*, recollected that he had business with a client, whom it was probable he should find at the *Auction Mart*; that he therefore called there in his way to *Westminster Hall*, and saw his client, and just as he was about to leave him for the purpose of proceeding to *Westminster*, he was arrested in this cause:—*Held*, that on this statement he was not entitled to the privilege.

A RULE had been obtained to set aside the *capias* issued in this cause for irregularity, and to discharge the defendant, who was a practising attorney of this Court, out of custody, on the ground that he was arrested when he was privileged, as being on his way to transact professional business in the Courts at *Westminster*. The defendant's affidavit, (which described him as of 19, *Gracechurch Street, London*,) stated that on *Saturday*, the 23rd *April*, having professional business in several cases to transact in this Court and the *Common Pleas*, he was proceeding through the city of *London*, in his way to *Westminster Hall* for that purpose, and on arriving at the *Bank of England*, recollected that he had some business with a client of his, and that it was probable he should meet with him at the *Auction Mart*; the deponent therefore called there in his way to *Westminster Hall*, and there saw his client, a Mr. *Hunter*; and just as he was about to leave him for the purpose of proceeding to *Westminster*, he was arrested at the suit of the plaintiff in this cause. On the other hand, the affidavit of the officer by whom the arrest was made stated, that he took the defendant into custody from the coffee-room of the *Auction Mart Coffee-house*, between two and three o'clock in the day; that the defendant did not tell the deponent that he was going to attend any of the Courts at *Westminster*, or any other professional business, but, on the contrary, that he had gone to the coffee-house to see a person about a loan for the purpose of paying the plaintiff's debt, and he was therefore sorry the plaintiff had taken him in execution. Another person, who had been employed to watch the defendant, also deposed, that he met the defendant coming out of the *Excise Office*, in *Broad Street*, about half-past one o'clock, and followed

him directly to the *Auction Mart Coffee-house*, passing down *Throgmorton Street*, and not going to or by the Bank of *England*; which going through *Throgmorton Street* was a diversion from the direct line to *Westminster*. And two persons, who occupied different parts of the ground floor of No. 19, *Gracechurch Street*, stated, that for several months past they had not seen the defendant come to his office, which was on the first floor, and that they believed he was keeping out of the way to avoid arrest; and that on the day of the arrest, the defendant's clerk came into the shop of one of these deponents, and said that the arrest was in consequence of the defendant's having gone to the *Auction Mart* to meet the party on the business of the loan, notwithstanding he, the clerk, had endeavoured to dissuade him from doing so.

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Platt shewed cause.—It is plain from these affidavits, that the defendant was arrested while *extra viam*, and not while *bond fide* proceeding to transact his professional business. His own representation to the officer is of itself enough to prove that such was the case. His business in the coffee-house was altogether foreign to his purpose of coming to *Westminster*; and it was an hour of the day at which it was scarcely possible that he could have been *bond fide* intending to proceed thither to attend any of the Courts.

Ludlow, Serjt., and *F. V. Lee*, *contrà*.—If the defendant was *bond fide* employed in the prosecution of an object in respect of which he was entitled to the privilege, he would not be deprived of it by a temporary deviation, for a reasonable time, from the direct way. And he swears that he was just about to proceed to *Westminster* when the arrest was made; the purpose, therefore, of the deviation was then completed. It comes to the same as if the *Auction Mart* had been his original place of starting;

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and it is admitted that he left home to attend the Courts. [*Parke, B.*—It is not said that he left home with that sole intention; it might have been with the intention also of doing a great deal of other business in different parts of the town, and ultimately attending at *Westminster*. He could have told us *where* he set out from, which he has not done.] The privilege is that of the *client*, not of the attorney, and all the cases lay down that it is not to be so strictly limited as to be forfeited by an occasional deviation from the direct object. In *Luntly v. ———* (a), where the defendant, a barrister, was arrested on his return home from the sessions, while in a picture-shop, he was held to be privileged, unless it had been shewn that he had remained in the shop an unreasonable time. [*Lord Abinger, C. B.*—It does not appear that he *diverged* from the way.] In *Lightfoot v. Cameron* (b), where a defendant in a cause, after the rising of the Court, went with his attorney and witnesses to dine at a tavern in *Palace Yard*, and was arrested while at dinner, the Court held that the privilege *redeundo* had not expired, and discharged him. There is no doubt that the privilege *eundo* is equally extensive with that of *redeundo*. In *Holiday v. Pitt* (c), where a witness in a cause tried at the *Winchester* Assizes on *Friday* afternoon, was arrested at seven o'clock on the *Saturday* evening, as she was entering the stage-coach which was to convey her home to *Portsmouth*, the Court held, that notwithstanding the time that had elapsed since the trial of the cause, her privilege had not expired. [*Alderson, B.*—There she was directly in her way home, and was privileged *redeundo*: the Court did not decide that she might not have been arrested at *Winchester* on *Saturday* morning. *Parke, B.*—I think it will be found in all the cases that the deviation was connected in some way with the

(a) 1 C. & M. 579.

(b) 2 W. Bl. 1113.

(c) 2 Str. 986; Gilb. Rep. 308.

return home. If we allow the privilege to this defendant, what is there to prevent an attorney, who has a cause in the paper, from going all over the city for half a day with impunity?] In *Pitt v. Coombs* (a), the plaintiff was held privileged, where, having made a motion in the cause, he left the Court, and in his way home first called at his office to refresh himself, and having remained there above an hour, left the office to proceed home, and went into a tailor's shop in the same street, in which he was arrested. It is plain he could not have been there for any purpose connected with the suit; and that case, in its circumstances, strongly resembles the present.

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LORD ABINGER, C. B.—I agree that the privilege should be extended to every case where the party was substantially *eundo*, *morando*, or *redeundo*; but it should be made to appear that that was undoubtedly the case. Where that substantially appears, the Court does not exact of the party that he shall go at full speed, or go by the nearest way possible; and I think all the cases which have been cited, when they come to be examined, depend on this—that it did not appear that there was in any of them any stay upon the road for a purpose entirely different from and unconnected with the progress home, which justified the arrest. Thus, in the case where the party was arrested while dining, it was necessary that he should dine somewhere, and the place where he dined was not out of his way from the Court. So, in *Holiday v. Pitt*, it did not appear that the party could get away sooner; and even if she could, she was arrested in fact when getting into the coach, that is, when she was in fact *redeundo*. It certainly behoves the party applying to state all the circumstances which entitle him to the privilege. In this case the affidavit is altogether defective. It is consistent with

(a) 5 B. & Ad. 1078; 3 Nev. & M. 212.

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it that the defendant might have set out at seven in the morning from some place and on some business wholly unconnected either with the city or *Westminster Hall*, merely reserving in his mind an intention to come to this Court at some period of the day. It would be admitting a very dangerous precedent if we were to say that a party might do that, and still retain his protection. If he had actually set out from the coffee-house on his way to *Westminster*, it would be a very different case; but it is not so: he was arrested there, and while he was on business wholly unconnected with the Court. This, too, was on a *Saturday*, a day on which the Court seldom sits late; and in fact this Court was up on that day at one o'clock. On his own statement, therefore, he might be in the prosecution of some purpose entirely unconnected with the privilege. There is no case in which it was allowed where the affidavit was liable to such objections. On the whole, I think no grounds are shewn for his discharge.

PARKE, B.—I am of the same opinion, and I found it entirely on the defect of the applicant's case. He does not say he left his own house in the morning, or where his own house is, or that he left it to go to *Westminster*, in respect of his attendance at which place only he could then be privileged. It is quite consistent with his affidavit that he set out for the city, solely to attend there to the business of his several clients, with an ultimate intention of going to *Westminster*. It is entirely on that ground I form my opinion; I say nothing as to deviation. The cases may all be reconciled with the principle of making a liberal allowance in favour of the party, while he is in fact *redeundo*.

BOLLAND, B.—I am of the same opinion. As to the case of *Lightfoot v. Cameron, De Grey, C. J.*, there says, "such a necessary refreshment as this is not to be looked

upon as a deviation;" and I should not have been prepared to say that this defendant ought not to be discharged if it were shewn that he stopped at the coffee-house for the purpose of necessary refreshment; but it appears that it was for an entirely different purpose.

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ALDERSON, B.—I am of the same opinion. It is quite consistent with this party's statement that he might never have gone into the city with the purpose of going that way to *Westminster Hall*. He uses "the way to *Westminster Hall*" in a very lax manner. According to his own statement, he appears clearly to have deviated in his way to *Westminster Hall*; and we find, too, in one of the affidavits on the other side, that his clerk attributed his being taken to his going to the *Auction Mart*, from which act he had endeavoured to dissuade him.

Rule discharged.

LEWIS v. ASHTON.

THIS was an action of *assumpsit* for money lent. The defendant was arrested and held to bail for 42*l.* 5*s.* At the trial before *Coleridge, J.*, at the last *Carmarthen Assizes*, the plaintiff proved an admission by the defendant to the constable who arrested him, that the plaintiff had at different times lent him money amounting to nearly 20*l.*; and the jury found a verdict for the plaintiff, damages 18*l.*

The plaintiff arrested the defendant for 42*l.* 5*s.* money lent, and proved on the trial admissions of the loan of 18*l.*, for which amount she had a verdict. On a motion to allow the defendant his costs under

the statute 43 *Geo.* 3, c. 46, s. 3, it appeared from the plaintiff's affidavit, that she had lent the defendant sums of money at different times, amounting to the sum for which he was arrested, but it did not appear that she had any witness to or evidence of such loans, beyond the defendant's admissions as proved on the trial. The defendant swore that she had lent him only 1*l.* The Court, although believing from the affidavits that the whole sum was due, and that the defendant's affidavit was false, held, that as the plaintiff could have had no reasonable ground to expect that she could recover the whole debt for which she made the arrest, the defendant was entitled to his costs under the statute.

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On a former day in this term, *John Evans* obtained a rule *nisi* to allow the defendant his costs under the statute 43 *Geo. 3*, c. 46, s. 3, on an affidavit of the defendant, which stated that the plaintiff never lent him any money except the sum of 1*l.*, and that he never had made the admission sworn to. In opposition to the rule was sworn the affidavit of the plaintiff, which set forth the several occasions on which she stated that she had lent the defendant different sums of money, amounting to the whole sum for which he was arrested, the savings of her service in the family of the Bishop of *St. David's*; that an intimacy had been formed between her and defendant, and that, in the confidence that he intended to marry her, she had been induced to let him have money at different times, for which she had no security or memorandum, but which he had repeatedly promised to repay her. Several other deponents, including the constable, also spoke to statements of the defendant, admitting himself, on different occasions, indebted to the plaintiff in different sums, (but not exceeding the amount recovered at the trial): and the constable stated that the defendant, when he said the plaintiff had lent him nearly 20*l.*, added, that “he was sorry he had not got more from her, as she had no witnesses to prove any thing, no one being present when she lent him the money.”

Chilton and *E. V. Williams* shewed cause, and urged that it was clear from the affidavits that the whole amount was justly due, and that the Court was not precluded by the authorities from considering all the circumstances of the case, and deciding according to their view of the justice of the plaintiff's claim.

Evans having been heard in support of the rule,

The Court (a) said, that although they had little or no doubt on the several statements of the affidavits, that the whole amount was due, and that the defendant had made a false affidavit, yet as it did not appear by any of the affidavits that the plaintiff had reasonable ground to expect, when she made the arrest, that she could prove herself entitled to recover to the amount for which she arrested the defendant, he was entitled to his costs under the statute, and the rule must necessarily be absolute.

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Rule absolute (b).

(a) *Parke, Bolland, Alderson,*
and *Gurney, Bcs.*

(b) See *Tipton v. Gardiner*, 5
Nev. & M. 424.

GUTSOLE v. MATHERS.

CASE.—The first count of the declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, was lawfully possessed of divers large quantities, to wit, 20,000 tulips, then being the property of the plaintiff, and being of great value, to wit, of the value of 10,000*l.*, and he the plaintiff was then desirous of selling and disposing of the same by public auction, and for that purpose had issued handbills announcing that they would be exposed to sale by public auction at No. 58, *St. George's Street, Canterbury*, on *Wednesday*, the 20th day of *May*, 1835; yet the defendant, well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff, and to cause it to be suspected and believed that the said tulips had been and were stolen from one

A declaration for words imputing that tulips of the plaintiff, about to be sold by auction, were stolen property, whereby purchasers were deterred from bidding, and the sale was defeated, was held bad in arrest of judgment, for not setting out the words *verbatim*.

The declaration, having stated that the tulips were about to be sold by auction, alleged that the defendant as-

serted and represented that *the said* tulips were stolen property:—*Held*, that this was sufficient, without stating that he spoke the words *of and concerning* the said tulips, the property of the plaintiff.

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John Mathers, the brother of the defendant, and to hinder and prevent the plaintiff from selling and disposing of the same, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the said exposure to sale of his said tulips, and to vex, harass, and ruin the plaintiff, heretofore and before the exposure to sale of the said tulips as thereafter mentioned, to wit, on the 15th *May*, 1835, wrongfully, injuriously, falsely, and maliciously asserted and represented, in the presence and hearing of divers good and worthy subjects of the realm, that the said tulips were stolen property.

The second count stated, that the defendant afterwards, and before the exposure to sale of the said tulips, to wit, on the 20th *May* in the year aforesaid, wrongfully &c., asserted and represented in the presence and hearing of *H. P.*, *T. Y.*, *W. Y.*, and divers other good and worthy subjects &c., of and concerning the said tulips of the plaintiff, so then about to be exposed to sale by public auction as aforesaid, that the said tulips were the property of the defendant's brother, and that whoever bought the said tulips would buy stolen property, (thereby then and there meaning that the said tulips of the plaintiff were the property of the said *John Mathers*, the brother of the defendant, and had been stolen from the said *John Mathers*). The declaration then alleged, that on the 20th of *May* aforesaid the tulips were put up to sale, but that by means of the committing of the grievances by the defendant, divers persons who were present at the sale, and who were about to become purchasers of great part of the said tulips, and would otherwise have bid for and purchased them, particularly the said *H. P.*, *T. Y.*, and *W. Y.*, were deterred and prevented from bidding, and declined to purchase the same or any part thereof; *per quod* &c.

Pleas—*first*, not guilty; *secondly*, that the plaintiff

was not lawfully possessed of the tulips, as in the declaration mentioned; on which issues were joined. *Exch. of Pleas,*
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At the trial before *Park, J.*, at the last Summer Assizes for *Kent*, the plaintiff had a general verdict, with one shilling damages. In the following term,

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Erskine Perry moved for a rule *nisi* to arrest the judgment, on two grounds. First, the first count of the declaration is bad, because the *colloquium* is not laid to have been respecting the plaintiff, or concerning the tulips of which the slander was spoken. It should have been laid of and concerning the plaintiff, or of and concerning the title in the property to which the slander referred (*a*). [*Parke, B.*—It is not meant to impute that the plaintiff stole them. This is not an action for defamation.] It does not sufficiently appear that the words were spoken of the property of the plaintiff. [*Parke, B.*—Yes. The statement is, that *the said* tulips were stolen property.] Secondly, the words ought to have been set out *verbatim* in the declaration. On this point the following authorities were cited: *Cook v. Cox* (*b*), *Gerrard's case* (*c*), *Gerard v. Dickenson* (*d*), *Crush v. Crush* (*e*), *Gresham v. Grindley* (*f*), *Hargrave v. Le Breton* (*g*), *Rowe v. Roach* (*h*), *Pitt v. Donovan* (*i*), *Com. Dig. Action on the Case for Defamation, D. 30*. A rule having been granted on the latter point,

Andrews, Serjt., and *George*, in this term, shewed cause.—The rule was obtained on the assumption that this is an action for *slander of title*. But it is not so—the words are merely an inducement to the complaint which is the ground of the action, viz. the damage sustained by the

(*a*) 1 Saund. 242 b.

(*b*) 3 M. & Sel. 110.

(*c*) Cro. Eliz. 196.

(*d*) 4 Co. Rep. 18 a.

(*e*) Yelv. 80.

(*f*) Ibid. 88.

(*g*) 4 Burr. 2422.

(*h*) 1 M. & Sel. 304.

(*i*) Ibid. 639.

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sale being defeated: in slander, the words themselves are the cause of action. Accordingly, there is this important difference between the cases, that, in slander of title, the truth of the words may be given in evidence under the general issue. *Watson v. Reynolds* (a). *Cook v. Cox* is no doubt an authority, that in cases of *slander* the words must be set out; but that does not apply here, where the gist of the action is the *special damage* arising from the non-sale. The declaration is framed in the same terms as in *Smith v. Spooner* (b), which was an action of the same nature with the present. In *Blizard v. Kelly* (c), a count in slander, charging that the defendant “had imposed upon the plaintiff the crime of felony,” was held good after verdict. [Lord Abinger, C. B.—That might be without words. Parke, B.—*Smith v. Spooner* was not properly an action for slander of title, but for making a malicious claim of title.] The statute 21 Jac. 1, c. 16, s. 6, which limits the costs in “actions upon the case for *slandrous words*,” to cases where the plaintiff recovers 40s. damages, is held not to apply to actions for slander of title, nor to actions for *special damage*, in consequence of *words not in themselves actionable*. *Law v. Harwood* (d), *Topsall v. Edwards* (e), *Carter v. Fish* (f), *Tidd*, Pr. 997. It is said, if the words had been set out, it might have appeared that they were actionable in themselves, and therefore that the plaintiff would be entitled to no more costs than damages. If so, the defendant ought to have objected on the trial, that the words alleged were not proved; it must be taken, after verdict, that the plaintiff proved the words set out in the declaration. If it be necessary to set out the words *verbatim* in this case, it must be equally so in actions for deceit or false representation, in which the effect of them only is ever stated. There are several dis-

(a) 1 Moo. & Mal. 1.

(b) 3 Taunt. 246.

(c) 2 B. & C. 283.

(d) Cro. Car. 141.

(e) Ibid. 163.

(f) 1 Stra. 545.

tinctions between an ordinary action of slander and the present. In slander, the defendant cannot give evidence of the truth under the general issue, whereas in this action he may: in the former, the plaintiff has no more costs than damages; in this, he has full costs: in slander, the action must be brought within two years; this is only confined, by the general Statute of Limitations, to six years.

But even if the Court is of opinion that the words ought to be set out, the defect is cured by verdict (*a*). [Lord Abinger, C. B.—I do not think the Court will be disposed to overrule *Cook v. Cox*, which is directly against you on that point.]

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Platt, and E. Perry, contra.—The cases cited on the other side were not cases of defamation of the particular subject to which the words referred. These are words directly defamatory of the plaintiff's property. Suppose they were true—it is submitted that would not be a defence under the general issue. In *Blizard v. Kelly*, the declaration stated that the defendant *wrongfully and without probable cause* imposed on the plaintiff the crime of felony: it was necessary, therefore, to give some evidence of the want of probable cause. Here it would not be necessary to prove the falsehood of the words, but only that they were spoken, and were of a nature calculated to injure the subject of which they were spoken. In actions of *deceit*, on the contrary, the falsehood of the words must be proved. [*Parke, B.*—That argument is at variance with the case of *Watson v. Reynolds*.] The declaration in that case is not set out in the report; probably the words were laid to have been spoken without reasonable or probable cause. [*Parke, B.*—The effect of the case seems to be, that this is not an action of slander, properly so called.] The utterance of the slanderous words is the

(*a*) 1 Saund. 228 a.

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wrong committed in this case, and the only wrong; and the rule, that the words are to be put on the record, in order that the Court may judge of their effect, applies, whether the words are actionable in themselves or not. There are several incidents to the action for slander of title, all of which furnish grounds for saying that the words ought to be set out. If the defendant claims title himself, the action does not lie: the words ought, therefore, to be set out, that the Court may see that he is not claiming title. *Gerrard's case* (a). Again, it does not lie, unless they are a direct impeachment of the title; *Crush v. Crush* (b); which cannot appear unless they are set out. In indictments for false pretences, or actions for deceit, the particular words do not constitute the gist of the action. [Lord Abinger, C. B.—Is not the *damage* the cause of action here?] It would appear clearly that the words are; because as soon as it appears that the defendant claimed title, he is entitled to a nonsuit. *Gresham v. Grindley* (c). So here, if the words had been set out, it might have appeared that there was a good title in the plaintiff, even if the tulips were stolen property. The plaintiff has no right to deprive the defendant of the opinion of the Court on the meaning of the words. Again, by not setting them out, he may deprive him of the benefit of the statute of *James*; since in all actions for slander of a trivial nature, the plaintiff might declare generally, state special damage, and waive the right of action for the words themselves, and so deprive the defendant of his costs under the statute. The argument on the other side goes to the extent, that in the case of non-actionable words, the statute is not to apply. Another rule of law is, that unless the damage alleged is the legal and necessary consequence of the words, it does not furnish a ground of action. *Vicars v. Wilcocks* (d). Here

(a) Cro. Eliz. 196.

(b) Yelv. 80.

(c) Ibid. 88.

(d) 8 East, 1.

the Court is not informed what the words were, and therefore cannot tell whether the damage necessarily resulted from them. The proposition may be laid down generally, that, in all actions of slander, whether by actionable words or by non-actionable words with special damage, the words must be set out; and the case of slander of title differs in no respect from that of non-actionable words. The cases of "imposing felony, &c. on the plaintiff," do not sound in slander at all. All the old entries, in *Coke*, *Lilly*, and *Rastall*, set out the words; and such seems to have been the case in the modern cases also; *Pitt v. Donovan*; and see 8 *Wentw. Pleading*, 297, and the Index, xi. The instances in *Comyns' Digest*, (*Action on the Case for Defamation*, D. 30), where the words are given, shew the same; since the words could not have been found, unless they were on the record.

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Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was a case argued a few days ago on a motion in arrest of judgment after verdict. The action is for slandering the plaintiff's title, and the objection is on the declaration, in its setting forth only the effect of the words said to have been spoken by the defendant, namely, that the tulips were stolen property, and in another count, that they belonged to another person and not to the plaintiff; whereas it is necessary that the words spoken, if the slander be by words, or if by sign, then the particular sign, should be set forth precisely, with the proper innuendoes on the record, that the Court may see there is a charge on the defendant which he is bound to answer. It is said, that the general rule, which requires the words or sign to be specified, is applicable to those cases only in which the action is, properly speaking, for

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slander; where there has been the use of some term or other matter affecting the person, character, office, or occupation of the plaintiff: but that it does not apply itself to a case like the present, where special damages are made the ground of the action. In looking into the cases that were cited, and the cases generally, we cannot find any authority for this distinction. In the case of *Nelson v. Dixie* (a), decided in the time of Lord *Hardwicke*, the words were in themselves actionable; in the report of that case, Lord *Hardwicke* is stated to have said at *Nisi Prius*, that the declaration would have been sufficient if the *substance and effect* of the words had been set out; but he is corrected by Lord *Ellenborough*, in the case of *Cook v. Cox*, who says the dictum of Lord *Hardwicke* was merely thrown out at *Nisi Prius*, and was evidently founded on a mistake, as there are no such precedents to be found in *Rastall's Entries* as those which he was supposed to have referred to. The case of *Nelson v. Dixie*, if deserving of any authority, is overruled by that of *Cook v. Cox*, and is not connected with any other case. In the case of *Cook v. Cox*, the judgment of the Court was delivered after much consideration, and that case appears to us a sufficient authority in support of the present motion, although special damage is alone the ground of action. But we think there is no difference in principle between either class of cases. If it were sufficient to state merely the effect of the words, any person would be at liberty to *swear* as to the effect of the words, without stating any precise words; and even if the witness did state precise words, the jury would have to judge of their legal effect, whereas that is generally to be decided by the Court. Words innocent in themselves might by the witness be perverted from their true meaning, or be by the jury so interpreted as to make a defendant clearly liable at law. It is not expedient to blend questions of law and

(a) Ca. temp. Hardwicke, 305.

fact together; the most useful object of all systems of pleading is to separate them; it ought, therefore, to appear to the Court, upon the face of the declaration, by the words or signs themselves, that they are sufficient to support such innuendoes or averments as may be necessary to apply to the subject; that they may bear the interpretation put on them, and present the injury which is charged to have resulted from them. We think it proper, for these reasons, to adhere to the general rule, by ordering an arrest of the judgment. There may be a class of cases where words are mixed up with the charge, to which this rule could not apply; as in the ordinary case of an action for deceit by reason of a false representation of character, or where an action is founded on a deceitful representation, to induce a party to advance his money; that is not properly an action for words. So also, where a man defeats the object of another by claiming goods that do not belong to him, and does that falsely and maliciously: in such case, it must be alleged that he did claim them as his own, and thereby defeated the plaintiff's object in respect of them; but the mere form of the words is not important. There the complaint is for an act done; this is for an injury resulting merely from certain words, namely, a representation that the plaintiff came by the tulips in an improper manner. We think the words ought to be set forth in the declaration, though, properly speaking, the action is for damages resulting from the false speaking. No precedent is found in any case of this sort where the words have not been set out. The rule will therefore be absolute for an arrest of judgment.

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Rule absolute.

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PEARSON v. SKELTON.

The rule that there is no contribution among joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

Where several persons were jointly interested in a stage-coach, and there was a partnership fund, out of which expenses were first to be paid, and the residue divided amongst them:—*Held*, that one of them, against whom damages and costs had been recovered in an action brought by a party to whom damage was done by the negligent driving of the coach, could not recover against another proprietor his proportion of such damages and costs.

ASSUMPSIT for money paid. *Plea, non assumpsit.* On the trial before Lord *Denman*, C.J., at the last *Yorkshire Lent Assizes*, it was proved that the plaintiff and defendant, together with several other persons, were jointly interested in a public stage coach, running between *Leeds* and *Harrowgate*. On one occasion, the coach had been negligently driven by the coachman employed to drive, and had occasioned the death of a horse belonging to a person named *Pickles*. *Pickles* brought an action against the plaintiff, and recovered. The plaintiff having paid the debt and costs in that action, sought to recover in the present action contribution from the defendant. It was objected at the trial, *first*, that the plaintiff and defendant being both wrong doers, an action for contribution would not lie, and *Merryweather v. Nixan* (a) was cited as establishing that point; and *secondly*, that an action at law would not lie between parties in respect of a partnership matter, but that the plaintiff's remedy was in equity. The Lord Chief Justice nonsuited the plaintiff, with liberty to move to enter a verdict for 6*l.*, that being the estimated amount of the defendant's contribution.

Knowles now moved accordingly.—The rule laid down in *Merryweather v. Nixan* only applies where both parties are actually employed in the commission of the tort. It does not apply in cases like the present, where the plaintiff was made a tort-feasor merely by inference of law, being rendered liable for the act of his servant, although he was not present and had no control over the servant at the time. This distinction was taken in *Adamson v. Jarvis* (b), where it is laid down that “the rule that wrong doers cannot have redress or contribution against

(a) 8 T. R. 186.

(b) 4 Bing, 66.

each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." And in *Woolley v. Batte* (a), which was precisely like the present case, the action was held maintainable. As to the second point, viz., that this was a partnership transaction, it may be doubtful whether that objection can be taken under the present plea. [*Parke, B.*—There can be no doubt about that (b).] Then this may be regarded as an insulated transaction, which did not occur in the general order and for the general purposes of the partnership, and therefore does not fall within the rule as to actions between partners. The objection, if there were any thing in it, would doubtless have been taken in *Woolley v. Batte*, but there it does not appear to have been raised.

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PARKE, B.—We will consult the Lord Chief Justice, and see what the evidence was as to the existence of a partnership fund. The first objection made at the trial does not apply.

On a subsequent day, PARKE, B., said that the Court had consulted the notes of Lord Chief Justice *Denman*, and there appeared to have been a partnership fund, out of which the expenses were first to be paid, and the residue divided among the proprietors. The nonsuit was therefore right.

Rule refused.

(a) 2 C. & P. 417.

(b) See *Worrall v. Grayson*, ante, 166.

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BAYLEY v. RIMMELL.

In an action by an assistant surgeon for wages, it was proved that the plaintiff had served the defendant for nearly half a year, and that payments were made during that time on account of wages, but not according to any yearly amount, or at any definite periods of the year. The plaintiff afterwards fell ill and was taken to a hospital, and after his recovery did not return to his employment, nor did the defendant require him to do:—
Held, that there was no evidence of any hiring for a year, and that the plaintiff was entitled to recover wages on a *quantum meruit* for the time he served.

THIS was an action by an assistant surgeon against his employer, to recover the amount of salary due to him in that capacity. The defendant pleaded, first, the general issue; and, secondly, that the plaintiff had misconducted himself whilst in his employ, and therefore was not entitled to any salary or wages. There was also a plea of payment of a sum of money into Court, and no damages *ultra*.

At the trial before *Gurney*, B., at the *London* Sittings after last *Hilary* term, the plaintiff claimed for salary for 161 days, at the rate of 200*l.* per annum, and he so described his claim in the particulars of his demand annexed to the record. No specific contract of hiring was proved, but evidence was given of the service. It appeared that after the plaintiff had been some time in the defendant's employment, he was taken ill, and went to a hospital, where he remained three months. He did not return to his employment, nor did the defendant request him to do so. It appeared that the plaintiff had been paid different sums of money, but not at any fixed or definite periods. It was submitted, that upon this evidence it must be taken to be a general hiring, and that in legal estimation that was a hiring for a year, and therefore that no wages were recoverable, as the year's service had not been performed. The learned Judge, however, thought that if even this were to be taken to be a hiring for a year, the strict rule of performance was not applicable to a case where the performance was prevented by the act of God, and that the plaintiff was entitled to recover rateably for the time he was engaged in the defendant's employ. The jury, accordingly, found for the plaintiff, for the sum of 59*l.* 16*s.* On the issue on the plea of payment of money in Court, the jury also found for the plaintiff.

Theobald now moved for a new trial, on the ground of misdirection. The evidence in this case shewed a general hiring, which in law is a hiring for a year, and unless the year's service was performed, or there was an improper dismissal by the master, the plaintiff could not be entitled to claim any wages. He cited *The Countess of Plymouth v. Throgmorton* (a), *Grimman v. Legge* (b). In *Thomas v. Williams* (c), where the servant was held entitled to recover on a *quantum meruit* for a portion of the year, the service was terminated by mutual consent, upon an express agreement that the servant should be paid rateably. He cited also *Beeston v. Collyer* (d), *Ridgway v. The Hungerford Market Company* (e), and *Turner v. Robinson* (f). [A rule was also asked for to reduce the damages.]

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LORD ABINGER, C. B.—On the first ground I think there should be no rule, since there was no evidence of any hiring at all. There was evidence of a service, and I incline to think that the interpretation put on the contract by the plaintiff is the true one, namely, that he was to be paid for his services what they should be worth. That inference the jury were at liberty to draw from this evidence, and I think they have done so rightly. On the other ground, with a view to have the damages reduced, the rule may be taken, unless the plaintiff will consent to reduce the amount of the verdict.

PARKE, B.—Admitting that there was some evidence of a hiring, and agreeing in the proposition that a general hiring, if unexplained, is to be taken to be a hiring for a year, I think there is abundant evidence in this case to shew that there was no hiring for a year. It appears that payments were made, but they were not made according

(a) 1 Salk. 65.

(b) 8 B. & C. 324.

(c) 1 Adol. & Ellis, 685; 3 Nev. & Ell. 171.
& Man. 545.

(d) 4 Bing. 309.

(e) 4 Nev. & Man. 797; 3 Ad.

(f) 5 B. & Ad. 789.

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to the yearly amount, nor at any definite periods of the year. The parties separated in the middle of the year, and neither did the plaintiff return, nor did the defendant require him to return and complete the service. If, indeed, the jury ought to have found whether this was a yearly hiring, the learned judge should have been required to leave that question to them; but there is really nothing to shew that the compensation was to be paid at the end of the year.

The rest of the Court concurred.

Rule granted on the second ground, as to the reduction of damages, which the plaintiff afterwards consented to.



LANGLEY v. The Earl of OXFORD.

In an action on a bond, to which the defendant had pleaded *non est factum*, the judge made it one of the terms of an order to change the venue, that the defendant should admit the handwriting of the attesting witness on the trial of the cause. The cause was tried, and the plaintiff obtained a verdict, which the Court afterwards set aside and granted a new trial on payment of costs, giving the defendant leave to amend the *oyer* and set out the condition more fully, which was accordingly done, and the defendant then pleaded a special plea, alleging that the condition had been altered since the execution of the bond:—*Held*, that the plaintiff was entitled to use the admission contained in the judge's order on the second trial, and that it was binding on the defendant.

DEBT on bond, in the penalty of 1300*l*. The defendant craved *oyer* of the bond and also of the condition, which being set out, stated it to be for payment of the sum of 650*l*., with interest for the same, after the rate of 5*l*. for each hundred pounds by the year. The defendant then pleaded that the words respecting the interest had been inserted in the condition of the bond after it had been executed. To which the plaintiff replied, taking issue thereon.

At the trial before Lord *Abinger*, C. B., at the *Middlesex* Sittings after last *Hilary* Term, the plaintiff produced the bond, the execution of which was attested by a subscribing witness; but he was not called. Evidence, however, was given of a search for him, but without success,

trial on payment of costs, giving the defendant leave to amend the *oyer* and set out the condition more fully, which was accordingly done, and the defendant then pleaded a special plea, alleging that the condition had been altered since the execution of the bond:—*Held*, that the plaintiff was entitled to use the admission contained in the judge's order on the second trial, and that it was binding on the defendant.

which the learned Judge held to be sufficient to excuse his not being produced. The handwriting of the attesting witness was not proved, but the plaintiff put in an order of Mr. Baron *Gurney*, dated the 10th of *February*, 1835, by which it was ordered, with the consent of both parties, that the venue should be changed from *Carmarthenshire* to *Middlesex*, the defendant thereby undertaking to admit on the trial of the cause, in case the subscribing witness should not be found, that the attestation was in his handwriting. The cause had been before tried in *Middlesex* after the above order was made, the only issue then being on the plea of *non est factum*; the words in the condition of the bond respecting the payment of interest, not having been set out on oyer. The plaintiff on that trial recovered a verdict, which the Court, in *Trinity* term last, set aside, and ordered a new trial on payment of costs, giving the defendant leave to set out on oyer the words respecting the interest; and the defendant accordingly did so, and pleaded the special plea now on the record. The defendant contended on the second trial, that the order of Mr. Baron *Gurney* did not apply to this trial, and that it was therefore incumbent on the plaintiff to prove the handwriting of the attesting witness. The Lord Chief Baron, however, admitted the bond in evidence without further proof, but gave the defendant leave to move to enter a nonsuit, on the above ground. On the bond being produced, it appeared to be in the common printed form of a money bond, and that the words "with interest for the same, after the rate of 5*l.* for each hundred pounds by the year," had been written in the blank space usual in such printed forms, along which, however, there was a line which had been drawn, either before or after those words were written; but no evidence was offered by either party as to the state of the bond at the time of its execution. The Lord Chief Baron left it to the jury to say whether the circumstance of the line running through the words raised in their minds such a suspicion as to

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induce them to call upon the plaintiff to explain it. The jury answered in the negative, and found a verdict for the plaintiff.

Sir *W. W. Follett* now moved to enter a nonsuit, on the ground that the admission contained in the judge's order, made previously to the first trial, was not evidence on this trial, as the pleadings were different. He admitted, that if the pleadings had remained the same, the admission might have been evidence on the second trial; citing *Elton v. Larkins* (a), and *Doe d. Wetherall v. Bird* (b). But he contended, that the oyer having been amended, and a new plea pleaded, it made it altogether a new record. In *Doe v. Bird*, there had been no alteration in the issue.

PER CURIAM.—There has been no alteration here, as far as this admission is concerned. The admission is to be used on the trial of the cause, whenever the trial takes place; no matter whether it be the first or the second trial.

Rule refused.

(a) 5 C. & P. 386.

(b) 7 C. & P. 6.

Ex parte MORRIS.

IN this case, *Rogers* applied to have the defendant's recognizances, which had been entered into within the city of *London*, discharged. He made the application with the consent of the city solicitor, and contended, that, as the city of *London* were entitled to all forfeited recognizances within the city (a), this was sufficient.

LORD ABINGER, C. B.—We cannot take notice of that. Notice of the motion ought to have been given to the Attorney-General, because *prima facie* the recognizances belong to the Crown; and this Court will not, without the

Although the city of *London* are entitled to forfeited recognizances entered into within the city of *London*, yet the Court will not allow a recognizance to be discharged, though the motion is made with the consent of the city solicitor, unless notice has been given to the Attorney-General.

(a) *The King v. The Mayor of London*, 1 C. M. & R. 1.

Attorney-General's admission, recognise the title of any other persons.

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Notice having been subsequently given to the Attorney-General, and he making no objection to the motion, it was ultimately granted.

ALEXANDER v. VANE.

ASSUMPSIT for the keep and feeding of certain horses for the defendant, for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded the general issue as to all except 33*l.* 5*s.*, parcel &c., and as to the residue, payment of that sum into Court: to which the plaintiff replied, taking and accepting the same out of Court in full satisfaction of the residue of the causes of action in the declaration mentioned. At the trial before *Gurney*, B., at the *Middlesex* Sitzings after last *Michaelmas* Term, it appeared in evidence, that the defendant, being about to set up a coach to run between *London* and *Brighton*, was in want of harness, and went, together with the plaintiff, to the shop of a person named *Palliser*, who was a harness maker, and that the defendant gave an order for the supply of goods, the plaintiff saying, after the order was given, that if the defendant did not pay, he would. The goods were supplied accordingly to the defendant, and a balance remaining due, the plaintiff went to *Palliser*, and induced him to issue an attachment upon the defendant's horses, which were then at the plaintiff's livery stables in the city of *London*, the defendant being about to remove them out of the jurisdiction of the city. The horses were attached, and the attachment being in the hands of the plaintiff's clerk, the defendant gave two cheques for 30*l.* each for the amount, which were post dated, to

A., being in want of some harness, went to *B.*, accompanied by *C.*, and ordered some, *C.* saying, in *A.*'s presence, that he would pay the money if *A.* did not:—
Held, that *C.* thereby acquired an authority to pay the money on the default of *A.*, and that, having paid it, he was entitled to recover it back from *A.*, the authority not being shewn to have been countermanded.

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the plaintiff, who handed them over to *Palliser*, and the horses were released from the attachment. The defendant subsequently paid the sum of 33*l.*; the plaintiff paid the balance of 30*l.* 10*s.* to *Palliser*, and the cheques were returned to the defendant. The defendant contended that the payment by the plaintiff was voluntary, and a letter was put in, which was proved to have been sent on the 20th of *October*, in which the plaintiff said—"Will you permit me to pay Mr. *Palliser* the balance due to him, after deducting the head-stalls you sent back, as he and I have had continual words about my releasing your horses from the attachment? Say, per bearer, if I shall pay him." No answer was proved to have been given to this letter, but the plaintiff paid the balance on the next day. For this sum of 30*l.* 10*s.* the plaintiff had a verdict, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover it.

Thesiger having, in *Hilary* Term last, obtained a rule to shew cause accordingly,

Platt and *Humfrey* now shewed cause.—This was a contract entered into by the three parties, all being present at the time the goods were ordered, the plaintiff saying that he would pay for them if the defendant did not: the defendant therefore impliedly gave him authority to pay the money, which authority has not been revoked.—The Court then called upon

Raines (with whom was *Thesiger*) to support the rule.—The undertaking of the plaintiff was not such an undertaking as to create a legal liability on him to pay this money. He had guaranteed it, but that was only verbally, and therefore it was not binding upon him according to the Statute of Frauds. [*Parke*, B.—The plaintiff was

never liable to pay it, but there was an authority given him at the time the goods were ordered to pay for them, and none of the subsequent transactions affect that original authority.] That authority must be taken to be revoked; the plaintiff, by writing the letter, shews that he did not consider he had any at that time, for he expressly asks permission to pay the money. He ought to have shewn, therefore, that the authority was renewed.

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LORD ABINGER, C. B.—I should be very much concerned if this action were not maintainable. Every point which could have been urged has been urged, but it appears to me that there is no ground to support this rule. No question turns upon the attachment, but the whole depends altogether upon the authority which the plaintiff had for paying this money. Now, although he was under no obligation to pay it, and had entered into no contract which bound him to do so, he had nevertheless made an engagement which bound him in point of honour, and that was entered into in the presence of the defendant. The payment must therefore be taken to have been made by his authority. The promise was, that, if the defendant did not pay, the plaintiff would; there was therefore an agreement, that, if the money was paid for the defendant, it might be recovered from him. Thus, if a man give an order to his banker to pay a sum of money, and he does so without having any funds in his hands, he may nevertheless recover the money. Then, has any thing occurred to revoke the authority? Nothing whatever. The whole of the transaction is consistent with the feeling on the part of the plaintiff, that he continued under an obligation to pay this money. He reports to the creditor the probability of the defendant's removing his property out of the jurisdiction; the defendant gives the cheques to him, thus keeping up the appearance of his obligation. Suppose

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the plaintiff had kept them, and paid them when dishonoured, surely he could have recovered upon them. But the defendant went and paid a part of the debt; if that had been taken by way of satisfaction, the plaintiff would not have been justified in claiming this money; but it is not suggested that it was. An arrangement was come to, and further time was given to the defendant, but it seems to have been for an indefinite period, and *Palliser* might have sued the defendant immediately after it. As to the letter, after all that had passed, it might be reasonable in the plaintiff, for his own security, to obtain an authority in writing to pay the money. If the defendant meant to revoke the authority, he ought to have written so in answer; but not having done so, as we are bound to take it on the evidence, the authority was continued, and the money, having been paid upon that authority, may be recovered by the plaintiff.

PABKE, B.—I entirely concur with the Lord Chief Baron. There is no difficulty in the case when the facts are rightly understood. (His Lordship here recapitulated the facts.) The plaintiff is bound to prove that he paid this money with the authority of the defendant. If the engagement had been made in the absence of the defendant, it would have given no authority to the plaintiff to pay the money, and the payment would have been made without any authority, express or implied. But, it being made in the presence of the defendant, there was an implied contract, that, if the plaintiff paid the money, the defendant would repay it. It is precisely the same as if the defendant had requested the plaintiff to pay the money. Then, has that authority been countermanded? If not, there is no doubt that it was a payment to the defendant's use and at his request. It appears that the plaintiff, knowing that he was bound in honour to pay the money, requests *Palliser* to lodge an attachment against the horses, which he accord-

ingly does. On that an arrangement is come to, that, on the defendant giving the cheques, the property shall be discharged from the attachment. The cheques are paid to *Palliser* through the plaintiff's hands, and this tended to shew that the authority still continued; they were given to *Palliser*, but the defendant, not being able to pay them when due, takes them back, and pays a part, with a sort of understanding that he should have a further time to pay the remainder. Up to this period nothing had passed to shew that the authority was countermanded. The next question is, whether the letter put in is any evidence of a countermand having been given. It does not appear that any answer was given to that letter. We must assume, either that no answer at all was given, or that the answer would not serve the defendant's purpose. But if it is to have such a meaning assigned to it, the point should have been left to the jury, whether the defendant meant to revoke the authority. We are not at liberty to draw that inference; the jury might possibly have thought there was a countermand of the authority, though I should not have so interpreted the letter, because it may be explained on a different supposition. The plaintiff might want a written authority for the payment, and might wish not to rely on the original verbal authority alone. As that authority, however, continued, the payment was duly made, and the amount may be recovered.

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BOLLAND, B.—As between the parties on this record, it appears to me that there was an original authority given to the plaintiff to pay this debt. The only question is, whether there is any agreement by the defendant to allow the plaintiff to pay the debt which he had incurred for him, and that if he did, he would repay him. Assuming that the witness has told the truth, and that the defendant was present at the time, we must take it that he did agree that the plaintiff should pay the debt on his default, though he

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might not be liable to pay in consequence of the statute. Then, what answer is given to the payment? The object of the letter might have been to obtain a written authority, or it might have been to ascertain whether the plaintiff would be right in paying the whole amount. He was certainly right in inquiring whether the returned head-stalls had been settled for. The attachment, and the other facts in the case, do not appear to me to affect our decision. Supposing *Alexander* to have given a binding guarantee, he might have claimed to be released by the relinquishment of the attachment, but this would have been no answer on the part of the defendant. Any giving of time might benefit him, but still he was ultimately bound to pay the debt. Nothing has occurred to waive the agreement originally entered into by him, and therefore he is responsible to the plaintiff.

GURNEY, B.—The defendant has suggested that he was not present when the goods were supplied and the plaintiff promised to guarantee the payment; but the evidence of *Palliser's* clerk proved expressly that he was.

Rule discharged.

INGLE v. BELL.

To a declaration in trespass for an assault and false imprisonment, the defendant pleaded

TRESPASS for an assault and false imprisonment. Plea, as to the assault and the giving of the plaintiff in charge to a certain policeman, and forcing and compelling that the plaintiff attempted forcibly to break and enter his messuage or public-house without the leave of the defendant, whereupon he, the defendant, resisted such entrance; and because the plaintiff behaved himself violently and created a disturbance in the street, by which means a mob was assembled and the defendant's business interrupted, and his customers annoyed, and because the plaintiff threatened to continue such violent conduct, and to renew his attempts and efforts to get into the house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his attempts and efforts was complied with, the defendant, *in order to preserve the peace*, and to secure himself from a renewal of such attempts and efforts, gave him in charge to a constable, to be carried before a justice of the peace:—*Held*, that the plea was good after verdict.

him to go in custody of the said policeman through the streets to a certain house, and there imprisoning and keeping and detaining him in prison, as in the said declaration mentioned—that the defendant was lawfully possessed of a certain messuage or public house, situate at &c., in which he inhabited, dwelt, and carried on business; and the defendant being so possessed thereof, the plaintiff, just before the said time when &c., with force and arms and with a strong hand did attempt and endeavour forcibly to break into and enter the said messuage or public house of the defendant, without the leave and licence and against the will of the defendant: whereupon the defendant, at the said time when &c. being in the said messuage or public house, in order to preserve the peaceable and quiet possession thereof, did resist and oppose such entrance of the plaintiff into his said messuage or public house, and in so doing, and because the plaintiff behaved himself violently and created a disturbance in the street, by which means a mob was assembled and the defendant's business interrupted and his customers annoyed, and because the plaintiff threatened to continue and persevere in such violent conduct, and to renew his attempts and efforts to get into the said messuage or public-house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his said attempts and efforts was complied with—the defendant was forced and obliged, *in order to preserve the peace* and to secure himself from a renewal of the said attempts and efforts of the plaintiff to get into the said messuage or public house, to give the plaintiff in charge to one *William Sexton*, then being a constable and peace officer, to take the plaintiff into custody and safely keep him until he could be carried and conveyed, and to carry and convey him, before some justice of the peace, to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law; and upon that

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occasion, the said *William Sexton*, so being such constable and peace officer as aforesaid, at the request of the defendant, did take the plaintiff into custody, and as soon as conveniently could be, to wit, forthwith, the plaintiff was carried and conveyed before Sir *Frederick Roe*, a justice of the peace, who examined him and discharged him. And thus the defendant justified the imprisonment.

To this plea the plaintiff replied *de injuria*.

The cause was tried before Lord *Abinger*, C. B., at the *Middlesex* Sittings after last *Michaelmas* Term, when the defendant obtained a verdict. *Platt*, in *Hilary* Term last, having obtained a rule to shew cause why judgment should not be entered up for the plaintiff *non obstante verdicto*, in respect of the imprisonment of which the plaintiff complained—

Wordsworth now shewed cause.—The case of *Timothy v. Simpson* (a) is an authority to shew that this plea may be supported. The plea alleges that the defendant was endeavouring to force himself into the defendant's house, and, having created a disturbance and raised a mob, threatened to continue it. The defendant was, therefore, justified in giving him in charge to a policeman, for the purpose of preserving the peace.

Platt and *Barstow*, *contrà*.—The plea does not disclose facts sufficient to authorize the defendant in giving the plaintiff in charge. It does not allege that there was any breach of the peace at the time the defendant interfered, and set the policeman in motion. It appears that the plaintiff was not in the house, but in the street, and the disturbance of the defendant's customers was not under such circumstances a sufficient justification; even if there had been any breach of the peace, the plea states that

(a) 1 C. M. & R. 757.

the plaintiff threatened to continue his violent conduct, which shews that it had ceased; and the mere apprehension of the threat being put into execution is not a sufficient justification. This case is distinguishable from *Timothy v. Simpson*; for there the customer was in the defendant's shop creating a disturbance, and refusing to leave it. It is submitted, that even if the police officer had been present and had heard the threats made, he would not have been justified in taking the party into custody, if the breach of the peace had ceased. [*Parke, B.*—It does not appear that the breach of the peace had ceased, but the contrary. In order to justify himself, the defendant must shew that there was a danger of the breach of the peace being renewed; and if he does so, that is sufficient]. The plea does not shew that there was any riot, or any affray, or any menace of any assault, which are the only causes for which a justice of the peace can call upon a party to find sureties to keep the peace. The plea does not state enough to shew a forcible entry, and the mere threat to break open the house would not warrant the justice in calling upon a party to find sureties.—They referred to *Burn's Justice*, Vol. 2, p. 759, as to the authority of the justice in such case.

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LORD ABINGER, C. B.—Is there then no remedy against a man who is attempting to break into a house with a mob at the door? I question whether this plea does not in terms state a riot.

PARKE, B.—If it were necessary, I should say there is enough set forth to shew that there was an unlawful assembly. But no doubt the plea is perfectly good after verdict.

Rule discharged.

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BALLARD v. WAY and Another.

Certain leasehold houses were sold by auction, which were described in the particulars and conditions of sale as a well-secured rental with reversionary interest, and as an eligible investment. By the provisions of a local act, for the establishment of the *South London Market Company*, the Company were authorized to treat for, purchase, and take the premises in questions for the purposes of the act. No notice was given of this liability in the particulars and conditions of sale; and the jury found as a fact that the vendee had no notice of the liability. The conditions contained no express warranty of title:—*Held*, in an action by the vendee against the vendors of the estate, that the plaintiff was not justified in stating this contract in the declaration, as a warranty of a clear title, free from all charges, incumbrances, and liabilities.

Held, also, that the purchaser was entitled to rescind the contract, on ascertaining that the premises were liable to be taken for the purposes of the act.

ASSUMPSIT.—The declaration stated that the defendants, surviving executors of the last will and testament of *Henry Boulton*, deceased, theretofore, to wit, on the 24th of *March*, 1835, by certain persons carrying on business as auctioneers, under the name, style, and firm of *Elgood & Ward*, the agents of the defendants in that behalf duly authorized, caused to be put up and exposed for sale by public auction certain property described in a certain particular of sale thereof, before then made, published, and circulated by the defendants. The conditions of sale, which were in the ordinary terms, were then set out, but nothing turned upon them. The declaration then averred, that on such exposure to sale as aforesaid, to wit, on &c., the plaintiff was the highest bidder for, and became and was the purchaser of, the said property so described in the said particulars of sale as aforesaid, upon and according to the said conditions of sale, at and for a certain price or sum, to wit, the sum of 455*l.*, and then and immediately after such sale paid into the hands of the said auctioneers, according to the said conditions, a large sum of money, to wit, the sum of 113*l.* 15*s.* as a deposit of 25*l.* per cent. in part of the said purchase-money, and which said sum was then accepted by the said auctioneers as the deposit, according to the said conditions of sale; and then also paid another large sum, to wit, the sum of 6*l.* 12*s.* 8½*d.* as one moiety of the said auction duty, payable in that behalf, and then signed an agreement for payment of the remainder of the said purchase-money, and to complete the said purchase according to the conditions aforesaid. And thereupon afterwards, to wit, on &c. in consideration of the premises, and that the plaintiff,

at the special request of the said defendants, had then undertaken and faithfully promised the said defendants to perform and fulfil all things in the said conditions of sale contained on the said plaintiff's part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, they, the said defendants, undertook and faithfully promised the said plaintiff to perform and fulfil all things in the said conditions of sale on the vendor's part and behalf to be fulfilled; and that they then had good and sufficient right, title, power, and authority to sell, transfer, and assign the said property to the plaintiff, free and clear of and from all charges, contracts, *incumbrances, and liabilities* whatsoever, other than and save and except those stated and set forth in the said description thereof in the said particulars of sale. And the plaintiff in fact said, that, although he, on the day and year first aforesaid, and from thence until and upon the said 14th day of April then next, and afterwards, was ready and willing to have performed and fulfilled all things in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to have been performed and fulfilled, and to have accepted a proper assignment of the said property at his own expense, and to have paid the remainder of the said purchase-money according to the said conditions of sale, and to have completed the said purchase, whereof the defendants afterwards, to wit, on &c. and often before and since had notice, and were requested to make a proper assignment to him, the plaintiff, of the property so bid for and purchased by him as aforesaid, free and clear of and from all charges, contracts, incumbrances, and liabilities whatsoever, other than and save and except those stated and set forth in the said description thereof in the said particulars of sale; yet the defendants, contriving and intending to deceive, defraud, and injure the plaintiff, did not perform or regard their said pro-

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mise and undertaking, in this, to wit, that they had not, at the time of the said exposure to sale, and sale and purchase, and of the making their said promise and undertaking, good and sufficient, or any right, title, power, or authority to sell, transfer, and assign to him the said property free and clear of and from all charges, contracts, and incumbrances and liabilities, other than and save and except those stated and set forth in the said description thereof in the said conditions of sale, in this, to wit, that five of the said six houses so put up and exposed to sale, and sold by the defendants and purchased by the plaintiff as aforesaid, to wit, the said houses numbered respectively 113, 114, 115, 116, and 117, long before the said exposure and putting up thereof to sale and purchase as aforesaid, and long before the time of making the said promise and undertaking of the said defendants, to wit, on &c. had been and were inserted in a certain schedule annexed to a certain act of Parliament made and passed in the 4th year of the reign of his present Majesty, intituled, "An Act for erecting, establishing, and maintaining a market in the parish of *St. George the Martyr*, in the borough of *Southwark*, in the county of *Surrey*," as part of the property which a certain company by the said act incorporated by and under the name of the *South London Market Company*, were authorized and empowered to treat for, purchase, and take and use for the purposes of the said act. And the plaintiff further said, that the said five of the said six houses so put up and exposed to sale, and sold by the defendants to and purchased by the plaintiff as aforesaid, at the time of such putting up and exposure to sale, and such sale and purchase thereof as aforesaid, and at the time of making such promise and undertaking of the defendants, were and still are and remain subject and liable to be treated for, purchased, and taken by the said company in the said act mentioned, for the purposes of the said act; and if he ac-

cepted an assignment and transfer thereof, he would, by reason of the right of the said corporation to treat for and purchase the same, be hindered and prevented from disposing of the same in such manner and to such advantage as he would and might do but for such right of the said corporation, and the value of the said purchase was and is much less than the same would be if such right did not exist; and the said property is by reason of such right of the said corporation of little or no value. And the remaining house of the said six houses, to wit, the said house numbered 112, was and is of no value to the plaintiff, without the said five other houses. And by reason of the premises, the said plaintiff has been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and has been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of 200*l.*, in investigating and endeavouring to procure such title and assignment as aforesaid, and has lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money so paid by him as deposit and duty as aforesaid, and other monies provided and kept by him the said plaintiff for the completion of the said purchase. The second count was for money had and received; the third, for interest; and the fourth, on an account stated.

Pleas, *first, non assumpsit; secondly*, that the said property was and is described in the said particulars of sale in the said declaration mentioned, as situate and being at the corner of *Earl-street*, and that the said property was and is also described in the schedule so annexed to the said act of Parliament, as situate and being at the corner of *Earl-street* aforesaid. And the defendants further say, that the description of the said property in the said particulars of sale, under and subject to which the said property was so put up and exposed to sale and so purchased by the plaintiff as in the said declaration men-

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tioned, in other respects corresponded and agreed with the description thereof in the said act of Parliament, and that the description thereof in this particular identified the same with the said property so in the said schedule mentioned; of all which the plaintiff at the time of the exposure of the said property to sale, and of such purchase thereof by him the plaintiff as aforesaid, to wit, on &c., had notice; and this the defendants are ready to verify &c.

To this plea the plaintiff replied, setting out the description of the premises in the particulars and in the schedule to the act, and averring that the descriptions did not correspond; and that he had not, at the time he so bid for and became the purchaser of the said property, any notice that the said five houses, part of the said property so bid for and purchased, were, or that any of them was, mentioned in the said schedule to the said act of Parliament, or that they were liable to be treated for, purchased, and taken by the said company, for the purposes of the said act; concluding with a verification.

Rejoinder, that the description of the said property contained in the said particulars of sale, so far as the same related to the said five houses, part thereof, did correspond and agree with the description thereof in the said schedule annexed to the said act of Parliament, and that the plaintiff had, at the time he so bid for and became the purchaser of the said property described in the particulars of sale, notice that the said five houses, part of the said property, were, and that each of them was, mentioned in the said schedule annexed to the said act of Parliament, and that they were liable to be treated for, purchased, and taken by the said company for the purposes of the said act; concluding to the country. Issue thereon.

The defendant had originally demurred to the first count, and the point ultimately raised in the case was argued by Coote in a former term, viz., whether the liability of the

property to be taken by the company was one against which the vendors had covenanted; but the Court then said, that as the defendants had admitted by their demurrer that they had entered into a contract by which they covenanted against all liabilities, the question was not open to them. The defendants then pleaded as above.

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The cause was tried before Lord *Abinger*, C. B., at the *London* Sittings after last *Hilary* Term, when the particulars of sale were put in. They were headed as follows:—"Well-secured rental of 62*l.* 10*s.* *per annum*, for about fifteen years, with reversionary interest. Particulars and conditions of sale of an eligible investment, secured upon houses and shops, in that extensive thoroughfare and commanding situation for business, the *London-road*." In the descriptive particulars the property was thus described—"This property being eligibly situated and well tenanted, offers a safe and desirable investment." The property was stated to be held on a lease for a term of sixty-one years from *Midsummer*, 1789, and underlet for certain terms of years, which were set out, and the net rental was stated to be 62*l.* 10*s.*, and at the end was added—"with reversionary interest." No notice was given at the sale or at any other time of the liability of the property to be taken by the Market Company. On the issue as to the description in the particulars of sale and the description in the schedule corresponding, evidence was adduced by the defendants to shew that there was difficulty in identifying the property: and the jury found that they did not correspond, and that the plaintiff had no notice in fact of the act of Parliament. The learned Judge was of opinion that the first count was not proved by the evidence, and nonsuited the plaintiff, giving him leave to move to enter a verdict on the last issue, if the Court should be of opinion that the act of Parliament was not of itself notice to the plaintiff.

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Erle having, on a former day in this term, obtained a rule to shew cause why the verdict should not be entered for the plaintiff on the first count, for the deposit, expenses, and interest, or on the second count for the deposit only—

Platt and *Barstow* shewed cause.—The first count was not proved, as the contract shewn in evidence was not such as that alleged in the declaration. The question is, what is the extent of liability of the vendor on an ordinary contract for the sale of a leasehold estate, without any express warranty of title. There is here no express warranty, and it is submitted that the law will not imply one against such liabilities as those which are set forth in the first count of this declaration. If the liability of property to be taken for public purposes, under acts of Parliament, were held to be an objection to the title, on an ordinary contract of sale, it would affect a great portion of the property of the kingdom. Such property must have been constantly the subject of sale, and yet no objection of the kind has ever been made. The point is entirely new. There are numerous acts of Parliament, such as highway, drainage, and railway acts, which have been passed, affecting various parts of the kingdom, authorizing land to be taken for the purposes of those acts, to such an extent as to affect the titles to a great quantity of property. So also, the customs' management act, 3 & 4 *Will.* 4, c. 51, s. 35, authorizes the commissioners of the treasury at any time to take half an acre of land within half a mile of the sea shore or of the tideway of any navigable river for a station-house for the customs or excise. So that if this were held a defect in the title, it is scarcely possible to see to what extent and to what consequences it might lead. If a party wanted to put up a property to sale, he must inquire first whether any act had ever passed affecting the property in this way. The only case which has the slightest analogy to the present

case is that of *Oldfield v. Round* (a). There, a meadow was sold without any notice of a footway round it, and also one across it, which of course materially lessened its value, and Lord *Rosslyn* decreed a specific performance, with costs, as *he could not*, he said, *help the purchaser who did not choose to inquire*. No fraud was imputed in the present case, and the vendors were executors, and quite as ignorant of this liability as the purchasers were. *Secondly*, this was a provision in a public act of Parliament, though of a local nature, and therefore, although the plaintiff had no notice in point of fact, he must be taken to have had notice in point of law.

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Erle, Sir *W. W. Follett*, and *Petersdorff*, in support of the rule,—The contract which the defendants entered into in this case amounted to a general warranty that the title was a good title. They have undertaken to dispose of a permanent investment in these houses and shops, which they could not do, as the very next day after the sale the purchaser might have been compelled to part with them to the company. Then they have entered into a contract which they could not fulfil. Every vendor does contract impliedly against a liability of this nature. Suppose the vendor had himself entered into a contract to allow this company to take the estate, could he have compelled a purchaser to complete his purchase? It is apprehended he clearly could not. Then how does the present case differ from that? The premises are comprised in the schedule to this act of Parliament, of the passing of which, by the rules and orders of Parliament, the testator or the executors must have had express notice. The defendants therefore sold this estate with notice of this liability. But it is said that the plaintiff must be taken to have had notice. Now, whatever may be the effect of public acts of

(a) 8 Ves. 508, cited in Sugden on Vendors, 307, 9th ed.

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Parliament, as evidence of the facts stated in them against all the world, it has been decided that these local acts are not evidence of the facts stated in them against strangers. *Brett v. Beales* (a). The clause which directs that they shall be deemed to be public acts, and judicially taken notice of as such, is only inserted for the purpose of making them admissible in evidence, but does not affect persons who are not parties to the acts with notice of their provisions. *Woodward v. Cotton* (b), *Beaumont v. Mountain* (c). There are many species of liabilities which have been held sufficient to rescind the contract. As in those cases where it has been held, that, where an act of bankruptcy has been committed, the vendor cannot compel a specific performance, though he swears he does not owe a debt, because it cannot be securely ascertained that there is not one. *Lowe v. Lush* (d), *Cann v. Cann* (e). So, in *Cave v. Baldwin* (f), where the vendor of certain newly inclosed lands undertook to convey them to the vendee, Lord *Ellenborough* held that that was an undertaking to convey the legal estate, and that, the vendor having only an equitable interest previous to the assignment by the commissioners, the vendee was entitled to recover his deposit. In *Barnwell v. Harris* (g), it was held, that a purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shewn only by presumption. *Welch v. Fort* (h) was also a case of a similar nature, where the contract of purchase was defeated by one of such liabilities, and the purchaser allowed to recover back the deposit and rescind the contract. But an objection is taken to the language of the declaration, because it alleges the contract to have

(a) Moo. & M. 421.

(b) 1 C. M. & R. 44.

(c) 10 Bingh. 404; 4 M. & Scott,
177.

(d) 14 Ves. 547.

(e) 1 Sim. & Stu. 28.

(f) 1 Stark. 65.

(g) 1 Taunt. 430.

(h) 4 Taunt. 334.

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been a warranty against all *liabilities*. The term “liability” means a liability affecting a particular estate in the hands of the vendee. The plaintiff here complains of a defect in the title of the vendor, resulting from a liability which will prevent him from enjoying the estate. It is therefore rightly described as a warranty against all liabilities. The other words, “charges and incumbrances,” would apply to other things. Then, if this be a defect in the title, the purchaser may shew it, notwithstanding there be a condition that the vendor shall not be called upon to produce the lessor’s title. *Shepherd v. Keatley (a)*, *Flight v. Booth (b)*. [Lord Abinger, C.B.—The Court are strongly of opinion that this contract may be rescinded, on the ground that these premises are liable to be taken under the act of Parliament for the purposes of the act. It is clear that the plaintiff never intended to contract, and did not contract, to purchase this mere right to compensation. The representation is, that it was a good investment, and that it was secured upon the premises. It turns out that it was no investment at all, and not secured. Our opinion is therefore made up as to the plaintiff’s right to rescind the contract. But the question remains as to the variance on the first count. I consider that these acts of Parliament do not affect all mankind with a knowledge of what is contained in them. *Parke, B.*—This is like a case where a whole neighbourhood has entered into a particular contract for the sale of certain estates, and an act of Parliament is passed for the purpose of carrying that bargain into effect. Such a bargain would be an incumbrance and a liability, against which a covenant for good title would apply.]

Cur. adv. vult.

LORD ABINGER, C. B.—In this case the Court have

(a) 1 C. M. & R. 117.

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(b) 1 Bing. N. C. 370; 1 Scott, 190.

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looked more fully at the declaration, and we think the word “liability” must include liability of every possible kind; on that count, therefore, the defendant is entitled to a verdict; but, on the count for money had and received, we think the plaintiffs are entitled to recover 100*l.*, the money advanced, less the expenses, for that they are entitled under the circumstances to have back their deposit.

PARKE, B.—This is an incumbrance created by a private act, to which the defendant’s testator may be considered a party; it is, therefore, much the same as if there had been a private agreement with him for land of the same nature and under the same circumstances as this. It is impossible that there can be a good title when the property is subject to such a liability as this. On the first count, however, the contract is stated too largely, because it must be taken to refer to liabilities affecting this particular estate. But, on the count for money had and received, the plaintiff is entitled to recover. The verdict will be entered, on the general issue, for the defendant on the first count, for the plaintiff as to the residue; and for the plaintiff on the special plea raising the question as to notice.

Rule accordingly.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

THORP *v.* COLE and Others.

THIS was a writ of error from the Court of *Exchequer* (a). The case was argued by *Erle* for the plaintiff in error, and by *Kelly* for the defendants; but as the arguments were substantially the same as those urged in the Court below, it is thought unnecessary to report them. *Patteson*, J., intimated, in the course of the argument, that the contract might have been entered into so as to be legal, as, for instance, if the costs had been left to the decision of the arbitrators, and they had been desired to give their *opinion* as to the validity of the rate.

By an agreement of reference, it was recited that the plaintiff had given notice of appeal against a rate made upon him, and that the defendants, the churchwardens and overseers, intended to defend the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them, as stated in the said notice, to arbitration, no

LORD DENMAN, C. J.—The difference of opinion which has taken place in the Court of *Exchequer* has required that we should give this case our deliberate consideration, which we have done. I have felt a wish on my part that

appeal was entered against the rate; and that the parties, in order to prevent further expense, and to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the matters mentioned therein to arbitration. The agreement then witnessed that the defendants (as far as they lawfully could as such churchwardens, &c.) and the plaintiff mutually agreed to abide by the award of *W. A.*, *R. D.*, and *P. B.*, or any two of them, who were to award and determine of and concerning the said matters in difference, and of and concerning all the costs, &c., of the said agreement and of the said notices of appeal, and of the said churchwardens, &c., in consequence of such notice of appeal, and of their preparation to resist such appeal, and to support the rate, and all matters relating thereto. The arbitrators awarded that the defendants should pay unto *T. E. F.*, attorney for the plaintiff, 16*l.* 12*s.*, his bill already delivered, and the amount of the costs of the said *T. E. F.* attending the arbitration, &c.; and they further directed that the defendants should deduct from the amount charged in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation:—*Held*, on error, that the submission and award were bad, inasmuch as the arbitrators had no authority to determine as to the validity of the rate, it not being by law a subject matter capable of reference to arbitration; and that the decision as to the costs incurred was merely accessory to the decision of the principal question; and there was therefore no sufficient consideration for the submission.

(a) See the case reported, 2 *ings* are fully set forth upon
C. M. & R. 367, where the plead- which the question arose.

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this agreement should be upheld, because in my opinion matters of this nature would be much better decided by persons residing in the neighbourhood, and acquainted with the nature of the property, than by the judgment of any Court. We are by no means of opinion that such an arrangement as this may not be binding, if properly entered into ; but we do not think that we can put such a construction upon this agreement as to consider it valid. It cannot be denied that the real question submitted was the validity of the poor rate. Now, that being the consideration for the agreement and the promise of the defendants, it appears that the arbitrators have been empowered to do what is not lawful to be done.

An attempt was made, with great ingenuity and force, to make out that other matters were properly submitted. One was, the principle on which the future rates should be imposed ; the other was the costs incurred in preparing for the appeal.

With regard to the principle on which future rates are to be made, no obligation is entered into at all ; with regard to the costs, they are merely accessory to the other matters submitted. In any way of looking at this case, the consideration is untruly stated ; if any thing is stated to be referred to the arbitrators, which they had no authority to decide, the consideration is untruly stated. It is not necessary to enter into the examination of the other objections, which are mentioned in the report of the judgment of the Court in *Crompton, Meeson, and Roscoe*.

We therefore think that this was no binding agreement, and that there was no right of action against the defendants.

Judgment affirmed.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Courts of Exchequer,
AND
Exchequer Chamber.

TRINITY TERM, 6 WILL. IV.

WHEATLEY and Another (Survivors of WILLIAM STEWART)
v. WILLIAMS.

1836.

THE first count of the declaration stated, that heretofore, and before the decease of *William Stewart*, to wit, on the 18th *Dec.* 1827, an account was stated between the plaintiffs and *William Stewart* and the defendant, and

The plaintiffs and *S.* sold a library of books for the defendant, some of which were returned by the purchasers as

imperfect. The defendant thereupon wrote to the plaintiffs the following letter, dated the 18th of *December*, 1827 :—" I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.* which sum I will pay in two years :"—*Held*, first, that this was a promissory note ; secondly, that it was evidence of an account stated, so as to defeat a plea of the Statute of Limitations to a count on an account stated with the plaintiffs and *S.*, in an action brought within six years of the 21st of *December*, 1829 ; although *S.* died before that time.

Semble, that such document, if stamped at the time when it was signed, is within the exception in the 55 *Geo.* 3, c. 184, s. 10, and may be given in evidence, though stamped with a *l.* agreement stamp.

A plea of the Statute of Limitations must conclude with a verification.

An attorney is not compellable to state, when examined as a witness, whether a document shewn to him by his client, in the course of a professional interview, was then in the same state as when produced on the trial ; *e. g.* whether it was then stamped or not.

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that on that account the defendant was found to be indebted to the plaintiffs and *Stewart* in the sum of 80*l.* 7*s.*; and thereupon afterwards, to wit, on &c., in consideration of the premises, and that the plaintiffs and *Stewart* would forbear and give time to the defendant for payment of the said sum for the space of two years then next following, the defendant promised the plaintiffs and *Stewart* to pay them the said sum in two years' time. The count then averred that the plaintiffs and *Stewart* did forbear and give time to the defendant for two years, but that the defendant did not pay the said sum, or any part thereof, to the plaintiffs and *Stewart* in his lifetime, or to the plaintiffs since his death. There were also counts for money paid by, and on an account stated with, the plaintiffs and *Stewart* in his lifetime.

Pleas, first, as to the first count, that it was not agreed by and between the plaintiffs and *Stewart* and the defendant in manner and form as in that count alleged; *secondly*, as to the last count, *non assumpsit*; *thirdly*, as to the whole declaration, the Statute of Limitations, concluding *to the country*; *fourthly*, a set-off for goods sold and delivered, money lent, paid, &c., and on an account stated between the defendant and the plaintiffs and *Stewart*: on all which issues were joined.

The cause was first tried before *Parke*, B., at the *Middlesex* sittings after *Trinity* Term, 1835. It appeared that the action was brought by Messrs. *Wheatley & Adlard*, as surviving partners of the firm of *Stewart, Wheatley, & Adlard*, auctioneers, in *Piccadilly*, to recover a balance of 55*l.* 7*s.* claimed to be due on account of a sale by them of the defendant's library by auction, in the year 1827, and of other transactions between them and the defendant in the lifetime of *Stewart*, who quitted the partnership in 1828, and died in 1829. The following letter, written and signed by the defendant, and stamped with a *l.* agreement stamp, was given in evidence for the plaintiffs:—

“ Gentlemen :—I have received the imperfect books (a), which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay you within two years from this date.

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“ I am, Gentlemen,

“ Your obedient servant,

“ *Theo. Williams.*

“ To Messrs. *Stewart, Wheatley, & Adlard, Piccadilly.*

“ *Decr. 18th, 1827.*”

It appeared that on *Stewart's* withdrawing from the partnership, this debt, amongst others, was taken by him to himself, the other partners receiving credit in their mutual accounts for their proportions of it; and payment was proved of 25*l.* on account of the debt, to *Stewart's* widow, who made a claim to it as his executrix, within six years before the commencement of the action.

It was objected for the defendant, first, that this letter amounted in law to a promissory note, and was inadmissible because it was not stamped as such; secondly, that there was no proof of the agreement to forbear alleged in the first count; and, thirdly, that at all events such agreement was within the fourth section of the Statute of Frauds, as being an agreement not to be performed within a year. This last objection the learned Judge overruled. On the part of the plaintiffs, an application was made to amend the pleadings, by concluding the plea of the Statute of Limitations with a verification, and adding the proper replication; which, however, the learned Judge refused: and, under his direction, a verdict was found for the plaintiff on the first and third issues, so far as related to the account stated; on the second and fourth issues, generally for the plaintiff: damages 55*l.* 7*s.*

In the following *Michaelmas* Term, *Platt* obtained a

(a) These were some of the books sold for the defendant, which were returned by the purchasers as imperfect, and the amount of which was charged to him by the plaintiffs.

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rule *nisi* to enter judgment for the defendant on the third issue *non obstante veredicto*, or for a new trial; and *Erle*, for the plaintiff, also obtained a rule *nisi* to amend the pleadings in the manner suggested at the trial, the plaintiff retaining his verdict.

In the same term, these two rules came on to be argued together; and the Court having intimated to *Hoggins*, who appeared for the plaintiff, that the principal question was as to the admissibility of the letter, he contended, upon that point, that even if the document amounted to a promissory note, it was rendered valid by the provisions of the 55 *Geo. 3*, c. 184, s. 10 (a). The exception in that clause applied to cases where the stamp *wrongly* applied was specially appropriated to any other instrument; the words "*such* instruments" referring to the previous description of "instruments for or upon which any stamp shall have been used of an improper denomination, &c." [*Parke, B.*—Then you would get rid of all the prohibitions against the re-stamping of bills and notes, by stamping them with an agreement stamp.] Besides, bills and notes at that time bore no distinctive name upon the stamp. At all events, it would be for the defendant to shew that the case came within the exception.

As to the objection to the plea of the Statute of Limitations, a sufficient issue is joined as it stands. No formal mode of pleading the statute is necessary; if a sufficient affirmative and negative appear on the record, that is enough. The statute requires that the debt shall have accrued within six years, in order to enable the plaintiff

(a) Enacting, that all instruments for or upon which any stamp shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp which ought regularly to have been used thereon, shall

nevertheless be deemed valid and effectual in law; except in cases where the stamp used on *such instruments* shall have been specially appropriated to any other instrument, by having its name on the face thereof.

to maintain the action. The plaintiff, therefore, by bringing the action, affirms that he is within the six years; the defendant alleges that he is not; the plea amounts to a traverse by force of the statute. [*Parke, B.*—Where has the plaintiff here said he is within the statute? All he says by his declaration is, there was a debt at some time.] Even though it might have been open to the plaintiff to refuse to join issue, he had a right to elect. He *might* have introduced new matter in his replication; but it was competent for him to take the issue tendered to him. *Veale v. Warner (a)*. [*Parke, B.*—The difficulty is, there is here a negative and no affirmative: there is nothing on the record equivalent to an averment that the cause of action was within the six years.] The plea of bankruptcy is an analogous one, and that concludes to the country. [*Parke, B.*—It is given by statute.] But not the *form* of it. [*Parke, B.*—I think you will find that the old statute gives the form (*b*).] At all events, the plaintiff is entitled to amend without costs, holding the verdict.

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PARKE, B.—Here there has never been a correct issue on which the jury were sworn, and on which all the facts could be investigated. The case has never been properly tried on any issue. Even if you are right on the question as to the stamp, there must be a new trial, because there has been no correct issue joined: then both parties may amend without payment of costs. It certainly seems to me at present, that the case is within the tenth section of the Stamp Act, unless in fact the stamp has been impressed since the instrument was signed. If it shall turn out to have been so, the stamp will go for nothing.

Rule absolute accordingly.

(a) 1 Saund. 327, note 1.

(b) The 5 Geo. 2, c. 30, s. 7, provides, that the bankrupt may plead *in general*, that the cause of

the action or suit accrued before such time as he became bankrupt, and may give the act and the special matter in evidence.

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The pleadings having been amended, the cause was tried again at the Sittings in last *Easter Term*, before *Gurney, B.* The same evidence, in substance, was given on the part of the plaintiff as on the former trial. For the defendant, it was alleged that the defendant's letter had been stamped after it was written and signed; and a *Mr. Bennett*, who was *Stewart's* attorney at the time when it was written, was called for the purpose of proving that fact. He stated that he saw the paper about the time of its date, and that it was shewn to him by *Stewart* as a matter of business, for which he had made a charge. It was then proposed to ask him in what state the paper was when it was shewn to him. This question was objected to, on the ground that the shewing of the paper to him was a privileged communication; and was disallowed by the learned Judge. His Lordship was also of opinion that there was sufficient evidence on the account stated; and a verdict was accordingly again found for the plaintiffs, damages *55l. 7s.*

On a subsequent day in the term, *Platt* obtained a rule *nisi* for a new trial, on two grounds: first, that the communication to *Bennett* was not privileged, and that he ought to have been allowed to prove that the letter was not stamped when shewn to him; and, secondly, that the part payment to *Mrs. Stewart*, being made to her on account of her husband's estate, was not evidence to take the case out of the Statute of Limitations, the legal right to receive payment being not in her, but in the surviving partners; the declaration being for money paid by, and on an account stated with, all the three partners.

In the present term, *Erle* and *Hoggins* shewed cause.—On the former motion, it was not argued that this document was a promissory note, but that the traverse, in the plea of the Statute of Limitations, was informal. [*Alderson, B.*—We clearly thought it a promissory note.] As

suming it to be so, it shews that the money mentioned in it would not be due until the 21st of *December*, 1829, which is within the six years. Being, therefore, to pay within the six years, it was evidence of an account stated within the six years, and with all the three partners; which constitutes the cause of action on which the plaintiffs sue. A promissory note may be used as evidence of an account stated as between the maker and payee. And the subsequent payment, though made to Mrs. *Stewart*, was made on account of the sum mentioned in the note.

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Then, *Bennett's* evidence, which went to exclude this document from proof, was rightly rejected. Any knowledge of his as to its condition must have been of a professional nature; it was shewn to him as the attorney of *Stewart*, and there can be no distinction between the case of a paper submitted to the inspection of an attorney, and an oral communication to him by the client. Suppose *Stewart* had in words asked the attorney's advice what to do, in order to make the instrument available in proof, could it be contended that that was not a privileged communication? and this is substantially the same case.

Platt, contra.—The letter itself, and its state when shewn to him, were within the attorney's *own* knowledge, and were no part of the confidential communication. There is nothing to shew that such communication had reference to the stamp. If it referred only to the legal effect of the letter, it had nothing to do with the point to which the proposed question applied. In *Buller's Nisi Prius*, 284, it is said, that an attorney may be examined to a fact of his own knowledge, and of which he might have had knowledge without being attorney; and the following instances are given:—"As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So, if the question were about a rasure in a deed or will, he might be examined to the question,

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whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any *confessions* his client may have made to him on such head." And the author refers to Lord *Say & Seal's case*, determined *Mich. 10 Anne*, by Sir G. Bridgman, with advice of all the Judges, as his authority for the above position. The production of the document *by the plaintiff*, as one on which he relies, differs this also from the general case of confidential communications. The evidence proposed to be given is in explanation of the very instrument which the plaintiffs put forth in the cause on which to recover: and it has no reference to any thing said by the client.

Secondly, even assuming the letter to be properly in evidence, there is nothing to take the case out of the Statute of Limitations, either as to the money paid or the account stated. The letter is only evidence of an account stated at the time when the paper is written, and the agreement made; and the payment to Mrs. *Stewart* is made at a time when the parties are changed, two only of the three partners being then in existence, and is made as upon an account stated, not with the three partners, but with her as *Stewart's* widow and executrix. [*Alderson, B.*—It is made in law to the two plaintiffs.] But not to them *and Stewart*. The plaintiffs might have joined counts stating an account stated with the two, but they have not done so. [*Lord Abinger, C. B.*—An account stated with three partners may be revived by payment to two of them after the death of the third.] But the contract must be stated on the record as that out of which the real liability arises, viz. the statement of account with the two.

LORD ABINGER, C. B.—I am of opinion that this rule should be discharged. As to the first question, which relates to the admissibility of *Bennett's* evidence, it has certainly been argued very ingeniously by Mr. *Platt*; but

the passage cited by him from *Buller's Nisi Prius* must apply to a case where the attorney has his knowledge independently of any communication from the client; it cannot mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he would not otherwise have possessed, he can be compelled to disclose it. Suppose an attorney, when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to disclose it? If, therefore, a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication. As to the other point, the answer given by Mr. *Hoggins* appears to me a satisfactory one: the paper proved on the plaintiffs' part, being admitted, is evidence of an account stated at the time when it was signed, but it shews also that the cause of action did not accrue until two years afterwards, that is, within six years before the commencement of the action.

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BOLLAND, B.—It is clear that the attorney would not have obtained the information in question, unless he had been called in to the professional advice of his client. On going to his client for that purpose, he finds the note is not properly stamped; that knowledge he would not otherwise have possessed.

ALDERSON, B.—I think the privilege extends to all knowledge that the attorney obtains, which he would not have obtained but for his being consulted professionally by his client.

GURNEY, B., concurred.

Rule discharged.

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BROOMFIELD *v.* SMITH.

In *indebitatus assumpsit* or debt for goods sold and delivered, the defendant may prove, under the general issue, that the goods were sold on a credit which had not expired at the time of action brought.

DEBT for goods sold and delivered. *Plea, nunquam indebitatus.* At the trial before *Arabin*, Serjt., at the Sheriff's Court in *London*, the sale and delivery having been proved, the defendant proposed to shew that the goods were sold on a credit which had not expired when the action was brought. It was objected for the plaintiff, on the authority of *Edmunds v. Harris* (a), that such defence was not admissible unless specially pleaded; the learned Serjeant so ruled, and rejected the evidence, and the plaintiff had a verdict.

Barstow obtained a rule for a new trial, citing *Taylor v. Hilary* (b), *Cousins v. Paddon* (c), and *Alexander v. Gardner* (d), to shew that *Edmunds v. Harris* could not be supported.

Ryland shewed cause, and again relied on *Edmunds v. Harris*. [*Alderson*, B.—How does this evidence confess or avoid the debt? It denies that there ever was a debt before action brought.] It admits a *debitum in præsentisolvendum in futuro*. [*Alderson*, B.—There is no debt till the credit has expired. How is the defendant indebted for goods sold and delivered till then?] The principle of the new rules is, that any matter which goes to avoid the cause of action must be specially pleaded. [*Alderson*, B.—*Avoiding* is admitting the cause of action, and *afterwards* avoiding it; here the defendant denies a cause of action.] The evidence appears to admit a debt, though not yet payable.

(a) 2 Ad. & E. 414; 4 Nev. & M. 182.

(b) 1 C. M. & R. 741.

(c) 2 C. M. & R. 547.

(d) 2 Bing. N. C. 671; 1 Scott, 281; 3 Dowl. P. C. 146.

LORD ABINGER, C. B.—It would shew that the plaintiff had no cause of action at the time of action brought. This Court has already decided (*a*), that where there is a special contract for goods sold, which has not been performed, and the plaintiff brings his action on the implied *assumpsit*, he may be met by that defence under the general issue. The rule must be absolute for a new trial.

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Rule absolute.

(*a*) *Cousins v. Paddon*, *suprà*; *Grounsell v. Lamb*, *ante*, 352.

HEATH v. FREELAND.

DEBT, in the sum of 10*l.*, for work and labour, and on an account stated. *Plea*, as to all the sum demanded, except 7*l.*, parcel &c., *nunquam indebitatus*; as to the 7*l.*, the plaintiff had judgment by default. At the trial before the under-sheriff of *Sussex*, the plaintiff proved carpenter's work done and materials found for the defendant, to the amount of 12*l.* 8*s.* 10*d.*; but gave no evidence applicable to the account stated. It was objected for the defendant, on the authority of *Cotterell v. Apsey* (*a*), that the plaintiff could not recover for *materials* on a count for work and labour. The under-sheriff reserved the point, and left the case to the jury, desiring them to say what they found to be due for work and labour, and what for materials. The jury found that 8*l.* 4*s.* was due to the plaintiff for materials, and 4*l.* 4*s.* 10*d.* for work and labour.

Gale having obtained a rule *nisi* to enter a nonsuit, in pursuance of the leave reserved,

G. T. White shewed cause.—The defendant's objection

A plaintiff cannot recover for *materials* on a count for *work and labour*.

Debt in 20*l.* for work and labour, and on an account stated. *Plea*, as to all the sum demanded, except 7*l.*, *nunquam indebitatus*; as to the 7*l.*, the defendant suffered judgment by default. The plaintiff proved work done to the amount of 4*l.* 4*s.* 10*d.*, and materials provided to the amount of 8*l.* 4*s.*, but gave no evidence applicable to the account stated:—*Held*, that the defendant was entitled to a nonsuit.

(*a*) 6 Taunt. 322.

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assumes that the 7*l.*, which is admitted by the record to be due, is to be applied to the work and labour exclusively. But that 7*l.* is stated in the plea to be parcel of *the debt generally*; and judgment having gone by default as to that sum, the plaintiff was at liberty to give evidence of work and labour, to cover the rest of the amount stated in his particulars. He has a right to apply this 7*l.* to the account stated, and go for the work and labour at the trial. The point, therefore, which is insisted on for the defendant, does not arise on this record. [*Parke*, B.—The meaning of the plea is, that the defendant was never indebted to the plaintiff either for work and labour, or on an account stated, in more than 7*l.*: you must shew that he was. Now there is no evidence at all of an account stated; and there is no evidence of work and labour beyond 4*l.* 4*s.* 10*d.*: the 7*l.*, therefore, more than covers that.] Then, if that be so, the case is distinguishable from *Cotterell v. Apsey*. There was there a regular building contract, and the argument was put on the ground that the contract being one entire contract to do several things, all those things must be stated in the declaration. But this was a common carpenter's job; no entire contract was proved; and it is unreasonable to divide the work and labour from the materials. The former may draw the latter after it, as a necessary part of the same employment. [Lord *Abinger*, C. B.—I fear you will not persuade the Court of that].

The Court, without calling on *Gale* for the defendant, made the

Rule absolute for a nonsuit.

BIANCHI v. NASH.

DEBT for goods sold and delivered. *Plea, nunquam indebitatus.* At the trial, before the under-sheriff of *Middlesex*, it appeared that the plaintiff was a dealer in musical snuff-boxes: that the defendant applied to him to *let* (or *lend*) him a musical snuff-box, and the plaintiff agreed to do so, on the understanding that the defendant was to have it and pay for it if it were damaged; and the sum of 3*l.* 10*s.* was to be taken as its value. The defendant received the snuff-box on this understanding; it was damaged while in his possession; and the plaintiff, in consequence, refused to receive it back, and brought this action for the price. The under-sheriff left it to the jury to say whether the agreement was, that, in the event of the box being damaged, it was to be a sale; and they found that that was the agreement, and gave a verdict for the plaintiff, damages 3*l.* 10*s.*

The plaintiff agreed to let (or *lend*) the defendant a musical snuff-box, on the understanding that if it were damaged, the defendant was to have it and pay for it; and 3*l.* 10*s.* was to be taken as its value. The defendant received the box accordingly, and it was damaged while in his possession: —*Held*, that the plaintiff was entitled to maintain an action for goods sold and delivered to recover the 3*l.* 10*s.*

F. V. Lee obtained a rule *nisi* for a new trial, on the ground that this was a mere bailment, which ought to have been declared on specially, and that there was no evidence to support the count for goods sold and delivered.

Chandless shewed cause.—It cannot be said, as matter of law, that there was no evidence to support the contract found by the jury; it was altogether a question for their consideration what was the nature of the agreement, and they have found that it was, in the event which happened, a *sale*. There is no need of authorities to shew that in the case of a conditional sale, on the condition taking effect, it becomes an absolute sale.

F. V. Lee, contra.—It is submitted that there was no

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evidence of a contract for goods sold. It was a mere bailment of the article, with a contract to pay an agreed sum for damage. [Lord *Abinger*, C. B.—No : to keep and pay for the article itself if damaged]. *Lyons v. Barnes* (a) is a direct authority in favour of the defendant. There the plaintiff sold the defendant beer in casks, giving him notice, that unless he returned the casks within a fortnight he would be considered the purchaser of them ; and Lord *Ellenborough* ruled that, although the defendant did not return the casks within the fortnight, the plaintiff could not recover for them as goods sold and delivered. [Lord *Abinger*, C. B.—That is only a *nisi prius* decision, and the facts certainly do not seem to me to warrant the judgment. *Parke*, B.—*Bailey v. Goldsmith* (b) is an authority that where goods are sold on sale or return, if they are not returned in a reasonable time, the value may be recovered on a count for goods sold and delivered.] But this was not a contract of *sale* at all.

LORD ABINGER, C. B.—I think there is no question at all on the general principle applicable to this case ; when goods are sold on condition, and the condition is performed, the sale becomes absolute. And there is as little doubt on the evidence, that this *was* a conditional sale, and that the condition was performed. The defendant agrees to pay the price of the box for it, in case he damages it.

PARKE, B.—There was clearly evidence for the jury that this was a contract for a conditional sale ; and it was a very reasonable contract. Then there no is doubt that the value was recoverable under the count for goods sold

(a) 2 Stark. N. P. C. 39.

(b) Peake's N. P. C. 56.

and delivered. As soon as the condition is performed, it is an absolute sale.

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The other Barons concurred.

Rule discharged (a).

(a) See *Studdy v. Sanders*, 5 B. & C. 628.

LEVI v. CLAGGETT.

JOHN JERVIS had obtained a rule *nisi* to reverse the outlawry issued against the defendant in this cause, on two grounds:—*first*, that the *capias* was issued with a direction to the sheriff to return it *non est inventus*; *secondly*, that, at the time of the exigent awarded, the defendant was beyond seas. The defendant's affidavit alleged that he went abroad on the 29th of *April*; that he did not go out of the way to avoid the process in this cause, and that he returned to *England* before the proclamations: that he was now in custody in this action, and a detainer was lodged against him in another.

Where a defendant was beyond seas at the time of the awarding of the exigent in outlawry, the outlawry will be reversed on payment of costs, and on bail being put in in the alternative in the original suit, as in the *C. P.*

Where the *capias* was issued with a direction to the sheriff to return it *non est inventus*, but it appeared also that a judge's order was obtained to return it in fifteen days, and that the defendant went abroad on the same day on which the writ was put into the sheriff's hands, to avoid his creditors; the Court refused to set aside the outlawry on the ground of such direction to the sheriff, except on payment of costs.

Humfrey shewed cause on an affidavit of the plaintiff's attorney, which stated that the writ issued on the 28th of *April*, and was put into the hands of the sheriff on the 29th, on which latter day the defendant went abroad, as the deponent believed, for the purpose of avoiding his creditors, writs being out against him to the amount of 28,000*l.*, which he had no means of satisfying. A judge's order had been obtained under the Uniformity of Process Act, 2 *Will.* 4, c. 39, s. 15, for the return of the *capias* in fifteen days.

The Court, in the first instance, had directed that the rule should be absolute generally; but subsequently called

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on *Jervis* to state whether he had any authority for reversing the outlawry on either of the above grounds, *without* payment of costs.

Jervis.—The direction to return the writ *non est inventus* is an abuse of the process, which makes the proceedings irregular: if so, the outlawry ought to be reversed without payment of costs. *Pigou v. Drummond* (a) is an authority to that effect, and was decided since the Uniformity of Process Act. [*Alderson, B.*—Have you looked at *Graham v. Henry* (b)? There the motion was to reverse the outlawry (on the ground that the defendant was abroad when the exigent was awarded), on payment of costs, and on putting in bail in the alternative, 'to pay the condemnation money or render.] There was a conflicting practice as to the proceedings in outlawry between the *King's Bench* and *Common Pleas*; but there is no rule of practice on the subject in this Court, and the question is, whether it will adopt that of the *King's Bench* or of *Common Pleas*. By the 10th section of the Uniformity of Process Act, writs are to be in force for four calendar months, and not to be returned sooner except by order of a judge. [*Gurney, B.*—The defendant did not suffer by that, because he had gone.] It may be said that it is the plaintiff's privilege to keep alive the writ for the four months, but the provision is also in aid of the defendants; since, to obtain a return sooner, the facts must be stated to a judge, and must be such as would afford ground for a *distringas*. In *Lewis v. Davison* (c), which may be referred to on the other side, the irregularity was not sufficiently shewn on affidavit, and it was assumed that the proceedings were regular.

As to the second point, it must be admitted that the

(a) 1 Bing. N. C. 354; 1 Scott,
264.

(b) 1 B. & Ald. 151.
(c) 1 C. M&R. 655

authorities are against the defendant as to the question of costs; and that in this case, both in the *King's Bench* and *Common Pleas*, the reversal would be on payment of costs, and putting in bail in the alternative. [*Alderson*, B.—That puts the defendant in the same situation as if he had given bail at first: how can you claim to be in a better situation?] On the first point, the defendant is entitled to insist on the irregularity. [*Alderson*, B.—As to that, the only question is, how far the affidavit on the other side satisfies us that your client went out of the way to avoid process. Lord *Abinger*, C. B.—He goes abroad the very day that the writ is put into the hands of the sheriff; therefore he was *non inventus*. What prejudice did he suffer?] However that may be, the plaintiff has no right so to direct the writ.

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LORD ABINGER, C. B.—I think the defendant should pay the costs in this case, without prejudice to what we may do hereafter under the particular circumstances of any other case. And I think we should adopt the practice of the *Common Pleas*, by which the recognizance of bail is taken in the alternative, in the original cause.

The other Barons concurred.

Rule absolute accordingly.

LLOYD v. JONES.

JOHN JERVIS had obtained a rule to set aside the writ of *capias* issued in this cause, on the ground of an irregularity in the indorsement. It was indorsed thus:—"This writ was issued by *Wm. Loaden*, 32, *Great James-street, Bedford Row*, agent for the plaintiff in person, who resides at *Barmouth*." The objection was, that the writ did not

The following indorsement on a *capias* was held irregular:—"This writ was issued by *W. L.*, 32, *Great James-street, Bedford-row*, agent for the plaintiff in person, who resides at *Barmouth*."

son, who resides

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appear to be sued out either by the plaintiff in person, or by his attorney, in conformity with the rules of Court.

Sir *G. Lewin* shewed cause, and contended that the indorsement was sufficient. Mr. *Loaden* was in fact an attorney of this Court; and all that the statute and the rule requires is, that the writ shall be indorsed with the name and place of abode of the attorney actually suing out the same. Here he has done more, for he has also put in, *ex abundanti cautela*, the place of abode of the party for whom he acts: the indorsement is exactly according to the facts.

Lord ABINGER, C. B.—He does not sue it out as *attorney*, but as *agent*.

ALDERSON, B.—The rule means to apply to the case where the party employs an attorney in the ordinary way, as an attorney. Here you do not say he sued out the writ as attorney.

Rule absolute.

OSBORNE v. WILLIAMSON.

Semble, that the affidavit in support of a motion to discharge a defendant, on the ground that he has become bankrupt and obtained his certificate, must shew that the certificate is inrolled.

HUMFREY had obtained a rule *nisi* to discharge the defendant, who was in custody on a judgment signed on a *cognovit*, out of custody, on the ground that he had become bankrupt, and obtained his certificate.

Petersdorff shewed cause, and took a preliminary ob-

jection. And the rule should be drawn upon reading the inrolment.

A defendant who had obtained his certificate as a bankrupt after the action was brought, was held entitled to be discharged out of custody, although the fiat issued long before the action was commenced, and the defendant had pleaded, not setting up his bankruptcy, and given a *cognovit*, conditioned for payment at a later period than judgment would have been obtained in the regular course.

jection that the affidavit in support of the action did not state that the certificate was inrolled, which must appear before the Court could act upon it so as to discharge the bankrupt. *Jacobs v. Phillips* (a).

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Humfrey.—The Court did not say in that case that the inrolment must be shewn *by affidavit*, but that it must be produced.—He produced the inrolment accordingly, with the seal of the Court affixed.

LORD ABINGER, C. B.—I do not see that the production of an inrolment in another Court is sufficient without some verification of it.

The rule was about to be enlarged, for the affidavits to be amended, when the objection was waived, and

Petersdorff shewed cause on the merits.—This is not a case in which the bankrupt ought to be discharged. The *fiat* issued so long since as *January*, 1835; the *capias* issued on the 23rd of *November*, 1835; the certificate was allowed 6th *May*, 1836. The defendant had pleaded to the action, not setting up his bankruptcy, and afterwards gave a *cognovit*, conditioned for payment of the debt and costs in three months, which was a later period than that in which judgment could have been obtained in the regular course. Here, therefore, there was time given, and a new security entered into. [Lord Abinger, C. B.—You call the *cognovit* a new security; it does not give the plaintiff a new debt. I presume the defendant gave it before his certificate, and when he expected to get it. A *cognovit* only admits the cause of action, and the party is entitled by the statute to be discharged if he is in custody for the same cause of action to which the certificate would have been a bar if

(a) 1 C. M. & R. 195.

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obtained in time.] The question is, whether the *cognovit* did not alter the relation of the parties.

LORD ABINGER, C. B.—Suppose there were a judgment by default, or the defendant consented to a verdict, would you say there was a new debt then? The *cognovit* amounts to no more. The rule must be absolute; but I think there should be an affidavit verifying the inrolment: the loose expression of the Lord Chief Baron, in *Jacobs v. Phillips*, that the bankrupt is to be discharged on the production of the certificate, may otherwise grow into a precedent that the mere production is sufficient. If it were a record of this Court, the case would be different; but we cannot take the inrolment of the Court of *Chancery* without some verification. At all events, whether it be evidence of itself or not, it ought to have been before us on granting the rule.

ALDERSON, B.—The proper course is, that the rule should be drawn up on reading the inrolment.

Rule absolute without costs.

BROOK v. LLOYD.

RULE for judgment as in case of a nonsuit.

Though the plaintiff, where his pleading concludes to the country, may now add the *similiter* without ruling the defendant to re-join: if he does not do so, the defendant must add the *similiter* before he can

Sewell shewed for cause, that the plaintiff had replied issuably, but the defendant had not added the *similiter*. The cause, therefore, was not at issue. He cited *Gilmore v. Melton* (a).

Archbold, contra.—By the rule of H. T. 2 *Will.* 4, s. 59, move for judgment as in case of a nonsuit.

(a) 2 Dowl. P. C. 633.

where the plaintiff's pleading concludes to the country, he may have the issue made up by adding the *similiter* for the defendant, without ruling the latter to rejoin, &c. When he has done that, the cause is at issue, and here he ought to have done it. The sending in of a *similiter* is now entirely dispensed with. [*Alderson, B.*—If the defendant wants to take advantage of it, he must do it himself, in case the plaintiff does not.]

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Lord ABINGER, C. B.—Your answer is, that the plaintiff might do it for you ; so he might, but, if he does not, you ought to add your rejoinder. You move on the ground of issue having been joined two terms ago : the answer is, that issue is not joined, because you have not rejoined.

Rule discharged with costs.

DOE *d.* PEMBERTON and Others *v.* EDWARDS.

EJECTMENT.—The parties had agreed to state the facts under a judge's order, in the form of a special case, for the opinion of this Court, pursuant to 3 & 4 *Will.* 4, c. 42, s. 25. The case stated was as follows:—

John Campbell, at the time of making the indenture of demise hereinafter mentioned, was seised in his demesne as of fee of the premises mentioned in the declaration in this ejectment, then in the occupation of *Mary Edwards*, the lessee hereinafter mentioned, or her undertenants, as tenant to him. And being so seised, the said *John Campbell* by an indenture bearing date the 29th of *September*, 1779, and duly inrolled in the Court of *Common Pleas* in the following *Hilary* Term, and made between him the said *John Campbell* of the one part, and *Mary Edwards*

By an indenture of lease certain premises were demised to *M. E.* and her heirs, *habendum* to her and her heirs for and during the natural lives of *M. E.*'s son, *J. E.*, her daughter *M. E.*, and *A. E.*'s granddaughter, and the life of the survivor of them. *A. E.* had a daughter, but he had not any granddaughter at the time of making the indenture, nor previously

thereto, though subsequently he had several granddaughters:—*Held*, that the lease was good for the lives of *J. E.* and *M. E.* only.

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of the other part, in consideration of certain yearly rent and covenants in the said indenture mentioned, demised the said premises, therein described as in the occupation of her and her undertenants, to the said *Mary Edwards*, to have and to hold the same to the said *Mary Edwards* and her heirs, from the feast of *St. Michael* the Archangel then last past, “for and during the natural lives of the said *Mary Edwards*’s son *John Edwards*, her daughter *Martha Edwards*, and *Alexander Edwards*’s granddaughter, and the life of the survivor of them.”

The said *Alexander Edwards* was a son of the said *Mary Edwards*; he had no granddaughter living at the time of making the said indenture, nor had he ever had any granddaughter before the said indenture was made, but he had a daughter *Elizabeth*, his eldest child, and two other children then living.

He did not have any granddaughter until the year 1797, when *Martha*, a daughter of his said daughter *Elizabeth*, was born, and since that time, and during the lifetime of the said *John Edwards* and *Martha Edwards*, two of the said *cestui que vies* named in the said lease, the said *Alexander Edwards* had twelve other granddaughters, all of whom, including the said *Martha*, the daughter of *Elizabeth*, are still living.

In the year 1807, the lessors of the plaintiff purchased the premises in question from the said *John Campbell*, and the same were by him duly conveyed to them, subject to the lease aforesaid.

Martha Edwards, one of the *cestui que vies* in the lease mentioned, died in *March*, 1830; *John Edwards*, the other of the *cestui que vies* in the said lease mentioned, died on the 10th of *March*, 1835; and the said *Elizabeth*, the daughter of *Alexander*, died some years previously to the said year 1835.

The question for the opinion of the Court was, whether

the estate created by the said indenture of demise was or not determined upon the death of the said *John Edwards*. *Exch. of Pleas,*
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The points stated in the margin were as follow:—

The lessors of the plaintiff contend that the lease expired on the death of the said *John Edwards*. DOE
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The defendant contends, that the lease was to endure for the life of *Alexander's* first daughter who should come into *esse* after the making of the lease, or any granddaughter living at the death of the two other *cestui que vie*s named, and that, consequently, it did not determine on the death of *John Edwards*.

E. V. Williams, for the lessors of the plaintiff, was stopped by the Court, who called upon

W. Rogers, for the defendant.—In this case, either an estate in fee simple was conveyed to *Mary Edwards*, or an estate which was to endure beyond the two lives of *John* and *Martha*. Either the words are definite, or they are indefinite and void, leaving the estate in fee to go to *Mary Edwards*. The demise is to *Mary Edwards* and her heirs, to have and to hold to her and her heirs, which would create an estate in fee. It is true that it goes on to limit that estate to three lives, but, if that limitation is indefinite, it is void, and the lessee has a right to refer to the first estate. Undoubtedly, the intention of the parties was that the lease should endure during the lives of *John* and *Martha*, and the life of any granddaughter to *Alexander* by his daughter *Elizabeth*, which, it is submitted, is sufficiently definite, and the defendant is therefore entitled to retain the possession. [Lord *Abinger*, C. B. —Suppose *Alexander Edwards* had had no granddaughter at the time that the other parties died.] Then perhaps the estate would not have continued beyond the lives of those two persons.

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LORD ABINGER, C. B.—The only doubt is, whether any estate passed at all. The Court are bound to construe the lease most strongly against the grantor, and therefore we ought to hold that it did pass some estate; but I do not think that we can engraft upon the words of the limitation the name of a person not then in existence. If any case had been cited to bind us to do so, it might have been otherwise. It appears to me that the estate was good for the two lives, but not for that not in existence at the time the lease was granted. There must therefore be

Judgment for the plaintiff.

DICKEN v. NEALE.

Debt, in 20*l.*, for a boat sold and delivered by the plaintiff to the defendant. Plea, as to 17*l.* 10*s.*, parcel of the said sum of 20*l.*, that the action, as to the said sum of 17*l.* 10*s.*, was brought to recover that sum as being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 20*l.* was parcel, such sum of 57*l.* 10*s.* being the price of the said boat sold and delivered by the plaintiff

DEBT, in the sum of 20*l.*, for the price and value of a boat bargained and sold by the plaintiff to the defendant, in 20*l.* for a boat sold and delivered by the plaintiff to the defendant, and in 20*l.* on an account stated. Pleas, first, *nunquam indebitatus*; secondly, as to 17*l.* 10*s.*, parcel of the sum of 20*l.* in the second count of the declaration mentioned, *actionem non*, because the defendant says that this action, as to the said sum of 17*l.* 10*s.*, parcel &c., is brought to recover of him, the defendant, the said sum of 17*l.* 10*s.*, parcel &c., as and being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 20*l.* in the second count mentioned is parcel, such sum of 57*l.* 10*s.* being the price of the said boat in the second count mentioned, sold and delivered by the plaintiff to the defendant; and the defendant further saith, that at the time of the sale of the said

to the defendant; that the plaintiff, at the time of the sale, warranted that the boat was sound, and that the defendant, confiding in such promise, bought the boat on the terms aforesaid, and then paid to the plaintiff the sum of 40*l.* in part and on account of the boat. The plea then averred that the boat, at the time of the sale and warranty, was unsound, and was not then worth more than the 40*l.* which *had been and was* so paid to the plaintiff for the same; and that the defendant incurred an expense exceeding 17*l.* 10*s.* in putting her into a sound state:—*Held* bad on special demurrer, as amounting to the general issue.

boat to him by the plaintiff, he the plaintiff warranted and promised the defendant that the said boat was sound and reasonably fit for use; and that he the defendant, confiding in the said promise of the plaintiff, did then buy the said last mentioned boat of the plaintiff on the terms aforesaid, and *then* paid to the plaintiff divers monies, to wit, to the amount of 40*l.*, in part and on account of the said boat: and the defendant further saith, that the said boat, at the time of the sale thereof to him, and the making of the promise of the plaintiff, was not sound or reasonably fit for use; but, on the contrary, was then, and until the defendant incurred the expense after mentioned, unsound and unfit for use; by reason whereof the said boat then became and was of little or no use or value to the defendant: and the defendant further saith, that the said boat, by reason of its being unsound and unfit for use as aforesaid, was not, at the time of the said sale and promise, reasonably worth more than the said sum of 40*l.*, which had been and was so paid to the plaintiff for the same; and the reasonable price and value thereof, by reason of the said breach of warranty, then was less than 40*l.*; and the defendant then incurred great expense, to wit, an expense exceeding the said sum of 17*l.* 10*s.*, parcel &c., in putting the said boat in a sound state, and rendering the same fit for use.—Verification.

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To this plea there was a special demurrer, on the ground that it amounted to the general issue.

Ogle, in support of the demurrer.—*Cousins v. Pad-don* (a) is a sufficient authority that this plea amounts to the general issue. Supposing the facts proved which are stated upon this record, the plaintiff could not have given evidence of the special contract, of which the warranty was part, under the general count, but must have been

(a) 2 C. M. & R. 547; 4 Dowl. P. C. 488.

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driven to his *quantum meruit*. [Lord Abinger, C. B.—Is not this rather a special plea of payment?] The question between the parties is only as to the *balance* of 17*l.* 10*s.*: if the action had been brought for the whole sum of 57*l.* 10*s.*, no doubt the defendant must have shewn in pleading the payment of the 40*l.*; but he has not tried to discharge himself of the whole sum.—The Court here called on

Archbold to support the plea.—The plea admits the contract of sale alleged in the declaration. [Lord Abinger, C. B.—No; it states what the contract really was—a special contract, with a warranty different from the implied contract stated in the declaration.] No doubt the defendant might give in evidence under the general issue that the goods were sold for a stipulated price; but he does not here say merely that the boat was sold for the stipulated price of 40*l.*, but that it was sold for 57*l.* 10*s.*, and that of that sum he has paid 40*l.* That admits part at least of the cause of action, and could not therefore be given in evidence under the general issue. *Cousins v. Paddon* is quite beside the present case. It is clear that this plea is in discharge only, at least so far as relates to the 40*l.*

Ogle, in reply.—[Lord Abinger, C. B.—The difficulty lies in the allegation of payment. The declaration claims 20*l.* for a boat sold and delivered; the plea says, “I owed you no more than for the value of a boat at 40*l.*, which I have paid.” It amounts to saying, “on the general implied contract, I have paid all that is due.”] It is submitted that it shews there was no cause of action at all on the general contract. How is the plaintiff to take issue on the plea? If he denies the warranty, he admits the boat was not worth more than 40*l.*; if he denies the latter allegation, he admits the warranty. The action is here

brought solely for the balance of 17*l.* 10*s.* : it was not necessary, therefore, for the defendant to plead the payment of the 40*l.*; but, if it was, *Cousins v. Paddon* precisely applies, for there had been a payment in that case. [*Gurney*, B.—Suppose there had been no allegation of payment at all, and the plaintiff had gone to trial, and proved the contract stated in the plea, to buy the boat for 57*l.* 10*s.*—could the defendant have proved payment of the 40*l.*?] The particulars would shew that the 40*l.* were given credit for. [*Gurney*, B.—You cannot incorporate your particulars with your declaration.] It appears also by the introductory part of the plea, that the action is brought only for the 17*l.* 10*s.* If it were for the 57*l.* 10*s.*, the plea would be bad on general demurrer, for confining the issue to the lesser sum. [Lord *Abinger*, C. B.—In *Cousins v. Paddon* there was a plea of payment; and all that the Court determined was, that under the general issue the defendant could shew the inferiority of the goods, so as to bring the claim down to the sum they were really worth, having pleaded payment of that sum. That case amounts only to this—that you may plead payment of the real value to a declaration which can be sustained only for the real value. The question is, whether this is not in effect a plea of payment. The real meaning of it seems to be this—There was a special contract between us, which you, the plaintiff, have not performed: then you are driven to recover the value only of the goods, which value I have paid.] The statement is, that the payment was contemporaneous with the contract; and the latter part of the plea speaks of the 40*l.* as money which, at the time of the sale, “had been and was” paid to the plaintiff.

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LORD ABINGER, C. B.—It certainly does therefore appear that the defendant was never indebted in the sum of 40*l.*, because that was paid before or when he bought the boat; so that he was never indebted in more than the dif-

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ference between the 40*l.* and the real value of the boat. I think, therefore, the plea does amount to the general issue.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

HART v. LEACH.

By the 6th section of the 57 Geo. 3, c. 93, it is enacted, that "every broker, or other person, who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs, &c., of any distress, to the person on whose goods and chattels any distress is levied:"—*Held*, that a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him to make a distress, in not delivering a copy of the charges of the distress.

CASE for an irregular distress.—The second count alleged that the defendant seized and distrained other goods and chattels of the like description, &c., as in the first count mentioned, as for and in the name of a distress for rent, to wit, 20*l.* due from the plaintiff to the defendant for certain tenements and premises. And the plaintiff averred, that the defendant thereby took an unreasonable distress for the said arrears of rent, and that a small part, to wit, one fourth thereof, then was of sufficient value to have satisfied the said distress, and all expenses of the same, and of the sale and appraisement thereof. And the plaintiff averred that the defendant did not give to the plaintiff, or leave at the chief mansion house, or most notorious place on the said premises, notice of the said distress, or of the cause of such taking; and the defendant *did not give a copy of his charges, and of all the costs and charges of the said distress*, or of any part thereof respectively, to the plaintiff, and the defendant therein respectively wholly made default; against the form of the statute in such case provided.

The fourth count was for taking an unreasonable distress; for not giving notice of distress; for not causing the goods to be appraised; for not selling for the best price, and for not leaving the overplus in the hands of the sheriff, undersheriff, or constable, for the use of the plain-

tiff. And the plaintiff averred that the defendant *did not give a copy of his charges, and of all the costs and charges of the said distress*, or of any part thereof, signed by him, to the plaintiff; and that the defendant, in all the said several notices respectively thereinbefore in that count charged upon him, then wholly made default; against the form of the statute in such case provided. The sixth count did not materially differ from the fourth.

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The defendant pleaded to each of these counts, so far as related to the defendant's not giving a copy of his charges, and of all the costs and charges of the said distress, that the distress was made by the defendant's direction, as landlord of the said tenements, and not personally by him, but by one *Thomas Edlin*, being a broker, and the broker of the defendant in that behalf, and who, as such broker, made and conducted such last-mentioned distress for the defendant; and that the defendant did not otherwise make or interfere in the distress; and the said charges and costs were the charges and costs of the said *Thomas Edlin*: concluding with a verification.

Demurrer, assigning for cause, that, as the defendant as landlord caused the distress, he thereby made himself a party thereto, within the meaning of the statute 57 Geo. 3, c. 93, s. 6; and that, as no bill of the costs and charges of the distress was given by the defendant or by his broker, the defendant, as landlord, was liable for the default. Joinder in demurrer.

The points stated in the margin on the part of the plaintiff were, the causes of demurrer specially stated, and that the plea did not deny that the defendant personally interfered in the distress, or that he made or interfered in the appraisement or sale personally or otherwise.

Mansel, in support of the demurrer.—The landlord is responsible for the neglect of the broker to deliver a copy of his charges, as required by the 57 Geo. 3, c. 93, s. 6. That section enacts, "That every broker, or other person,

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who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied." This statute must be taken in conjunction with the *2 Will. & Mary*, sess. 1, c. 5, s. 1, which enables the person distraining to cause the goods to be appraised, and after such appraisement to sell them for the best price that can be gotten, towards satisfaction of the rent, and of the charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hands of the sheriff, undersheriff, or constable, for the owner's use. The landlord has been always held responsible under that statute for irregularities in the taking of distresses. The words, "every broker or other person, who shall make or levy any distress," in the *57 Geo. 3*, must be referred to the words, "the person distraining," in the *2 Will. & Mary*, and the landlord would be the person distraining. There are three things to be done in making a distress; the taking the goods, the appraisement, and the sale. The plea, however, does not shew that the defendant did not interfere in any of the three stages of making the distress, but only alleges that the distress was made by the broker. It does not go on and say, that the defendant did not appraise and sell. [Lord *Abinger*, C. B.—You say, although he did not interfere in taking the distress, he might have afterwards appraised and sold.]

Channell, contra.—The declaration alleges that the defendant did not give a copy of his charges, and of the costs of the distress, to the plaintiff; and the plea is confined to that particular complaint. [Lord *Abinger*, C. B.—If the word "distress," in the declaration, is to be taken to mean the whole that is done in making the distress, why is it not to be so taken in the plea?] Then, the other question is, whether the landlord is the person meant in the

statute, or whether it applies only to the broker or other person actually interfering in the taking and selling the distress; and it is submitted that it clearly applies to the person actually making and interfering in the distress.

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LEACH.

Mansel replied.

LORD ABINGER, C. B.—The defendant says in his plea that he did not personally interfere in making the distress, but that it was made and conducted by the broker; which must be taken to be from the beginning to the end. Then the question is reduced to the construction of the statute. The second section impowers the justice to order the person who shall have levied any other or greater charges than those mentioned in the schedule to pay the penalty; that clearly must mean the broker who actually levies, and not the landlord who does not interfere. Before that statute, the party had no right to have a copy of the charges. It appears to me that the sixth section applies to the broker or other person who actually interferes in the distress.

PARKE, B.—I think the statute only applies to those persons who actually interfere in making the distress. It says, that “every broker, or other person, who shall make and levy any distress;” that is, the broker or other person who actually seizes and assists in making the distress. It then goes on to provide, that “he shall give a copy of his charges.” Now, it is only a person who does some manual work who can have any charges to make. It appears to me that there is no doubt as to the construction of the statute. Then, as to the plea, I think it must be taken to mean that the defendant did not interfere at all in the distress, from beginning to end.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

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ELIZABETH ASHBEE, Administratrix of JOHN ASHBEE,
deceased, v. ISAAC PIDDUCK and THOMAS NEAME.

Action on a money bond for 2800*l.*, the penal sum. Plea, craving oyer of the condition (which was for securing the repayment of 1400*l.* and interest), as to 800*l.*, parcel of the sum of 1400*l.* in the condition mentioned, that, after the day named in the condition, the defendant paid the sum of 800*l.*, parcel of the said sum of 1400*l.*:—*Held*, on special demurrer, that the plea was bad.

Where three persons entered into a joint bond, and it did not appear, either on the bond or condition, that two of them were sureties for the other:—*Held*, that a release given by the obligee to the representative of one of the deceased obligors was no answer to an action against the surviving obligors.

In an action of debt on bond, it is not necessary to aver a

breach in nonpayment of the money. It is sufficient for the plaintiff to shew the debt due, and then it lies on the defendant to discharge himself.

DEBT.—The declaration stated that the defendants, together with one *Hannah Harrison*, since and before the commencement of the suit deceased, to wit, on the 7th of *January*, 1815, by their certain writing obligatory, sealed &c., acknowledged themselves to be held and firmly bound unto the said *John Ashbee*, deceased, in 2800*l.*, above demanded, to be paid to the said *John Ashbee*; yet neither did the said *H. Harrison*, deceased, in her lifetime, nor did the said defendants, pay to the said *John Ashbee* during his lifetime, nor have the said defendants since his decease, nor hath either of them at any time, paid to the said plaintiff, as administratrix as aforesaid, although often required, the said 2800*l.* above demanded.

The defendant *Isaac Pidduck* craved oyer of the bond, which was accordingly set out, and also of the condition, which was, that, if *H. Harrison* and the defendants, their heirs &c., should pay to the said *John Ashbee* the full sum of 1400*l.*, together with interest &c., on the 7th of *July* then next, the obligation should be void. He then pleaded, as to the sum of 800*l.*, parcel of the said sum of 1400*l.* in the said condition mentioned, that, after the 7th of *July* in the said condition mentioned, and after the death of the said *H. Harrison*, and after the decease of the said *John Ashbee*, and before the commencement of the suit, to wit, on &c., he the said defendant *Isaac Pidduck*, and the other defendant *Thomas Neame*, paid to the plaintiff as administratrix as aforesaid the said sum of 800*l.* in the introductory part of this plea mentioned, and parcel of the said sum of 1400*l.* in the condition mentioned,

together with all interest then due on the whole of the said sum of 1400*l.* in the condition mentioned: concluding with a verification. And the said defendant *Isaac Pidduck*, as to the said 600*l.*, residue of the said sum of 1400*l.* in the condition mentioned, pleaded that he and the defendant *Thomas Neame* made and joined in the said writing obligatory at the request of the said *Hannah Harrison*, as the sureties only of her the said *Hannah Harrison* to the said *John Ashbee* in the said writing obligatory mentioned; and that, after the making of the said writing obligatory, and after the said 7th of *July*, 1815, in the said condition of the said writing obligatory mentioned, and before the commencement of this suit, to wit, on &c., the said *Hannah Harrison* duly made and published her last will and testament in writing, and thereby nominated and appointed *Robert Harrison* executor thereof; and that afterwards, to wit, on &c., the said *Hannah Harrison* died without having altered or revoked her said will; and that afterwards, and after the death of the said *Hannah Harrison*, to wit, on &c., the said *Robert Harrison* duly proved the said last will of the said *Hannah Harrison*, and took upon himself the burthen of the execution thereof. And the said defendant *I. P.* further says, that afterwards, and after the death of the said *H. Harrison*, and after the death of the said *John Ashbee*, and whilst the plaintiff was such administratrix as aforesaid, and whilst the said *Robert Harrison* was such executor as aforesaid, to wit, on &c., 21st of *April*, 1831, by a certain indenture, &c., [setting out a deed of composition between the said *Robert Harrison* and his creditors, by which he conveyed all his real estates, and also assigned and transferred all his debts and sums of money, goods, chattels, and effects to certain trustees, of whom the defendants were two, upon trust to pay a dividend to such of the creditors who should agree to take the dividend in full satisfaction of their debts, and should sign

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and seal the said deed, whereby they agreed to release the said *Robert Harrison* from all further claim.] The plea then alleged that the plaintiff, being one of the creditors of the said *Robert Harrison*, in respect of the said 600*l.* in the introductory part of the plea mentioned, as such administratrix as aforesaid, did sign and seal the said indenture in token of her agreement to partake of such dividend; and that, except as aforesaid, the said *Robert Harrison* was not, at the time of signing and sealing the indenture, indebted to the plaintiff in any further or other sum of money whatsoever. Verification.

The other defendant suffered judgment by default.

The plaintiff demurred to the first plea, and assigned the following causes, viz:—That the said first plea is wholly irrelevant, inasmuch as it is not pleaded to any part of the sum demanded in the declaration, but to a different sum, namely—parcel of the said sum of 1400*l.* mentioned in the condition of the said writing obligatory; and also that a payment of a part only of the said sum of 1400*l.*, after the day mentioned in the condition, was no satisfaction or discharge of any part of the penal sum mentioned in the said writing obligatory and demanded in the declaration; also, that the plea doth not traverse, or confess and avoid the cause of action in the declaration mentioned, or any part thereof; also, that payment of part of the sum mentioned in the condition of the bond, after the forfeiture of the bond, cannot be pleaded in bar of this action, which is for the recovery of the penalty of the bond.

The plaintiff also demurred to the second plea, assigning the following causes, viz:—That the said plea is wholly irrelevant, inasmuch as it doth not appear that the said *Robert Harrison*, either as executor of the said *Hannah Harrison* or otherwise, was ever in any respect liable to pay to the said plaintiff, either as administratrix as aforesaid or otherwise, any part of the said money either in the said writing obligatory or in the said condition

thereof mentioned ; nor how the said supposed release in the said plea mentioned was or is any discharge to the said defendant *Isaac Pidduck* and the said *Thomas Neame* or either of them, of or from any part of the said sum in the said declaration above demanded, nor how the plaintiff was one of the creditors of the said *Robert Harrison* in respect of the said sum of 600*l.*, as in the said last plea is alleged ; also, that the said *Robert Harrison*, being in law a stranger to the bond, a release to him could not operate as a release to the obligors of the bond or any of them, nor could any satisfaction of the bond or any part thereof accrue from him ; and also, that the said plea doth not traverse, or confess and avoid the cause of the action in the said declaration mentioned, or any part thereof ; and also, that the said plea is pleaded to parcel of the sum of 1400*l.* in the condition of the said writing obligatory mentioned, and not to any part of the sum demanded in the declaration : whereas, inasmuch as the penal sum mentioned in the bond became a debt at law on the forfeiture of the bond, and as the said penal sum is the sum demanded in the declaration, the last plea ought to have been pleaded to parcel of the penal sum ; and also, that the alleged release in the last plea mentioned is therein stated to have been a release of 600*l.*, parcel of the said sum of 1400*l.* in the condition mentioned ; but a release of parcel of the last mentioned sum, after the forfeiture of the bond, was no release of the sum demanded in the declaration, which is the penal sum mentioned in the said writing obligatory, or any part thereof.

Joinder in demurrer.

Addison, in support of the demurrer, was stopped by the Court, who called upon

Erle to support the pleas.—The first plea is in effect a plea of *solvit post diem*. [Lord *Abinger*, C. B.—The

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penal sum is due, and you plead *solvit post diem* as to part only of the money mentioned in the condition.] The bond is given to secure the repayment of 1400*l*. The statute 4 *Anne*, c. 16, s. 12, enacts, that, where an action of debt is brought upon any bond which hath a condition or defeasance to make void the sum on payment of a lesser sum at a day certain, if the obligor have before the action brought to the obligee the principal and interest due by the condition of such bond, though payment was not made strictly according to the condition, yet it shall nevertheless be pleaded in bar of such action. Suppose the obligor had paid 600*l*. and 800*l*., then the plea would be a good answer to the action, and it is allowable to plead that a part, namely, 800*l*., has been paid. [Lord *Abinger*, C. B.—The bond became forfeited by the nonpayment of the money at the day named in the condition. Then the statute of *Anne* gives the plea of *solvit post diem*, but it does not authorize such a plea as the present.] Then, as to the second plea—*Hannah Harrison* was the principal debtor, and the defendants were only sureties for the principal debtor, and they had therefore a right to avail themselves of the release given to *Robert Harrison*, her representative. The debt was satisfied by the deed and the release contained in it. This action is an evasion of that release; and if the Court give judgment in favour of the plaintiff, the defendants may commence an action against *Robert Harrison* to recover back the money. By taking this intermediate step, the plaintiff will be enabled to recover a second time.

Addison.—This was a joint bond; and a release to the executor cannot be a release to the surviving obligor, as on the death of one it survived to the others. No action could be maintained against *Robert Harrison*.

LORD ABINGER, C. B.—How does it appear that these

defendants were sureties? It does not appear from the condition of the bond that they were so, and you cannot, as against the obligee, shew that they were. If that had been stated in the condition, there might have been grounds to support a plea of an equitable discharge; but the statute does not give you a plea of release upon condition.

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Erle.—Then, the declaration is bad on general demurrer. It does not appear that *Hannah Harrison* did not pay this sum to the plaintiff after *John Ashbee's* death. It alleges that neither did the said *Hannah Harrison*, deceased, in her lifetime, nor did the said defendants, pay to the said *John Ashbee*, during his life, nor have the said defendants, since his decease, at any time paid to the said plaintiff as administratrix as aforesaid the said 2800*l.* It is perfectly consistent with this that *Hannah Harrison* may have paid the plaintiff after *John Ashbee's* death.

Addison.—It is submitted that it is not necessary to aver any breach at all. It is enough to shew that the money is due, and it is for the defendants to shew that it has been satisfied; in the nature of a defeazance.

Lord ABINGER, C. B.—It is not necessary to allege a breach in the declaration. The plaintiff has alleged quite sufficient, by shewing that the defendants were indebted. It is for them to shew that the debt has been satisfied. I think Mr. *Addison* has answered the objection.

Judgment for the plaintiff.

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DAVENPORT *v.* DAVIES.

The plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands by the plaintiff and *R.*, and won by the plaintiff of *R.*:—*Held*, that he could not recover the amount of his own stake, on proof that he had re-demanded it from the defendant before it was paid over.

ASSUMPSIT for money had and received. Plea, *non assumpsit*. At the trial before Lord *Denman*, C. J., at the last *Liverpool* Assizes, the plaintiff sought to recover the sum of 13*l.*, which had been deposited in the hands of the defendant, as stakeholder, as the amount of two wagers made by the plaintiff with one *Roberts*, one of 10*l.* to 1*l.*, and the other of 1*l.* even, “that the plaintiff was worth 3000*l.*, and he would prove it the next morning;” or, at all events, the sum of 11*l.*, which was the stake deposited by the plaintiff, and which, it was alleged, he had re-demanded before it was paid over by the defendant. The particulars of demand were as follow:—“This action is brought to recover the sum of 13*l.*; viz., 11*l.* deposited by the plaintiff, and 2*l.* deposited by one *Roberts*, in the hands of the defendant as a stakeholder, and won of the said *Roberts* by the plaintiff, on or about the 15th of *November* last.” The plaintiff failed to prove that he had won the wagers (on which point there was much conflicting evidence), but proved a demand of his stake of 10*l.* It was objected, for the defendant, that the plaintiff could not recover the stake so deposited under the above particular. The Lord Chief Justice was of that opinion, but left the case to the jury, who found a verdict for the plaintiff, damages 10*l.*, leave being reserved to the defendant to move to enter a nonsuit.

In *Easter* Term, *W. H. Watson* obtained a rule accordingly (a), against which

Wightman now shewed cause.—The variance between the particular and the real claim is quite immaterial: the

(a) He obtained a rule also for a new trial, on the ground that the wager could not be rescinded; but the Court did not decide on that ground.

defendant must have known whether the money was in fact demanded, and on what ground, and could not therefore have been misled. [Lord *Abinger*, C. B.—In your particular you claim the wager as won; he comes therefore to shew that you did not win, not that you did not rescind the contract. Your particular invites him to the question whether the wager has been decided for him or you.] It points to the particular money which the plaintiff seeks to recover; it is the same money, though it was demanded in another right; and the defendant would have no answer to either case, without calling the witnesses who were present at the transaction. A plaintiff is not bound to precise accuracy in his particular, if the defendant sustains no prejudice by the variance. *Harrison v. Wood* (a), *Lambirth v. Roff* (b).

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LORD ABINGER, C. B.—This is a very clear case. I think the impression of the learned Judge was quite right, and that he should have nonsuited. The particular, in effect, makes the general count for money had and received, a count for money received under particular circumstances, which the plaintiff ought to prove; whereas he proves a totally different case. The defendant might have a host of witnesses to prove that the plaintiff did not win the wager; then the latter comes into Court with a case entirely different—that he demanded back his money before the wager was decided. If he had given the defendant information of that, he might have had evidence to shew that such a representation was altogether inconsistent with the facts. I think the rule should be absolute for a nonsuit.

The rest of the Court concurring,

Rule absolute.

(a) 8 Bing. 371; 1 M. & Scott,
536.

(b) 8 Bing. 411; 1 M. & Scott,
597.

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TURNER v. SWAINSON, Clerk.

An action of trespass *qu. cl. fr.*, in which there was a justification of a public right of way, was referred to an arbitrator, with power to direct what should be done between the parties. He directed a verdict for the defendant, and that the plaintiff should put up a stile and bridge upon the way, in a place described. It appeared that that place was not on land of either the plaintiff or defendant:—*Held*, that this latter part of the award was void.

THIS was an action of trespass *quare clausum fregit*, in which the defendant justified under a public right of way. The cause and all matters in difference were referred at *Nisi Prius* to an arbitrator, with power to direct what should be done between the parties. The arbitrator, by his award, set aside the verdict which had been entered for the plaintiff, and directed a verdict for the defendant; and he awarded also that the plaintiff should put up a stile and footbridge on the way in question in a place described in the award.

R. V. Richards had obtained a rule *nisi* to set aside that part of the award which directed the putting up of the stile and bridge, on an affidavit of the plaintiff, that he had no right to go upon the ground on which he was directed to put them up. The arbitrator could not direct that which would subject the party to an action of trespass.

Talfourd, Serjt.; shewed cause on an affidavit stating that there was no doubt that the owners of the land would grant permission to enter upon it for the purposes directed by the award; that the road was one leading to a parish church, and required for the accommodation of all the parishioners, and that one great object of the reference was that it should be made accessible by the means mentioned in the award. He urged that the plaintiff's affidavit did not state that he had made any attempt to obtain permission, or to comply with the award. [*Parke*, B.—When we granted the rule, we thought it would turn out that the acts in question were to be done on the defendant's land; it appears that is not so.]

Richards, contra.—The arbitrator clearly could not

direct the plaintiff to do that which would make him liable to other parties as a trespasser. [*Parke, B.*—The terms are not conditional—to do it, provided the owners of the land consent.] No; and even if they were, the award is bad; the arbitrator has only power to compel the party to do that which he can justify in law.

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PARKE, B.—I think the award would have been sufficient, if it had said this was to be done, provided the owners and occupiers of the land should consent. As it is, however, I am disposed to think the award is void. The terms of the submission extend only to what is to be done between these parties: the moment the interests of third parties come in, it is beyond the authority given by the submission. So far, therefore, as the award refers to any thing to be done on the land of third persons, it is not within the submission: no action could be maintained for not doing it.

The other Judges concurred.

Rule absolute.

RETALLICK v. HAWKES.

THIS was an action of *assumpsit* to recover damages for the non-completion of an agreement by which the defendant had engaged to assign certain leasehold premises to the plaintiff. The plaintiff complained in the declaration of having been compelled to lay out large sums of money about the procuring of the conveyance, &c.

The Court will not compel a plaintiff suing for the breach of an agreement, and assigning by way of special damage that he has incurred certain expenses, to furnish particulars of such special damage.

John Evans, for the defendant, moved for a rule calling on the plaintiff to furnish particulars of the special damage of which he complained. The defendant was unable to complete his agreement, because the lessor had refused him a licence to assign the premises, and was desirous to

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ascertain the amount of the special damage sustained by the plaintiff (which it was believed consisted of his attorney's bill), in order that he might pay it into Court. [Lord Abinger, C. B.—You will not stop the action by that, because the plaintiff will go on for the liquidated damages.] Enough may be paid into court to cover also the general damage. This is a case in which, under the recent statute, 3 & 4 Will. 4, c. 42, s. 21, money may be paid into Court.

The Court (a), however, held that they had no power to compel the plaintiff to furnish such particulars, and the rule was

Refused.

(a) Lord Abinger, C. B., Bolland, Alderson, and Gurney, B.

WILLIAMS v. PIGGOTT.

If such circumstances be shewn as satisfy the Court that the process has come to the possession of the defendant, that is a sufficient personal service, within the 12 Geo. 1, c. 29.

MANSEL had obtained a rule *nisi* for setting aside the proceedings in this cause for irregularity, on the ground that the defendant had not been duly served with the writ of summons. It appeared from the affidavits that the writ issued on the 7th of *May*; that, between that day and the 16th, the clerks to the plaintiff's attorneys attended repeatedly at the defendant's house in *Lamb Lane, Hackney*, for the purpose of serving it, but that the outer door leading into the fore court of the premises being always kept locked, they could not gain admittance; and on every occasion they were informed by a servant, through a wicket gate, that the defendant was not at home. On the 16th of *May* the defendant's attorney was applied to to give an undertaking to appear in the action, and stated that he had the defendant's directions to appear for her, but wished to have such directions in writing before he gave the undertaking, which he expected to obtain in the course of

that day. The undertaking, however, not being given, on the 21st of *May* the clerk to the plaintiff's attornies went to the defendant's house, and on his ringing the bell at the outer gate, a female servant of the defendant opened the wicket gate, when he gave her the copy of the writ of summons, inclosed in a sealed envelope, and addressed to the defendant, and requested her to give it to her mistress (the defendant), and told her he would wait for an answer. The servant took the note into the house, and after the lapse of a few minutes came back to the gate and peeped through the key-hole, and immediately afterwards returned into the house. The clerk continued to wait at the gate for an answer, and, no one coming, again rang the bell, when a man came and opened the wicket, and said that no one was at home. The clerk (who had been informed that the defendant had been seen in her garden that afternoon) thereupon requested the man to bring back the note, but he replied "Oh! no, I can't do that."—The affidavit proceeded to state the deponent's belief that the defendant was then in the house, and had opened the envelope containing the copy of the writ. The plaintiff, after the lapse of eight days, entered an appearance for the defendant under the statute. The debt was under 20*l*.

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Erle shewed cause, and contended that upon these affidavits there could be no doubt whatever that the writ had come to the knowledge of the defendant, and cited *Phillips v. Ensell* (a), and *Rhodes v. Innes* (b), as cases in which strict personal service had been dispensed with, where it was clear, on all the facts, that the process had come to the hands of the defendant.

Mansel, contra.—The only safe rule for the guidance of the Court is to abide by the directions of the statute. The

(a) 2 Dowl. P. C. 684.

(b) 7 Bing. 329; 5 M. & P. 153; 1 Dowl. P. C. 215.

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12 Geo. 1, c. 29, s. 1, provides that in cases not arrestable, the plaintiff shall serve the defendant *personally* with a copy of the process, and if the defendant shall not appear at the return of the process, or within four days, in such case it shall be lawful for the plaintiff, on affidavit of the *personal service* of such process, to enter a common appearance, or file common bail for the defendant. A remedy is provided by the third section of the Uniformity of Process Act for the cases where personal service cannot be effected, by the application for a *distringas*; and that course ought to have been pursued here, instead of proceeding at once to enter an appearance. The consequence will otherwise be that the provisions as to the *distringas* will be evaded altogether. The jurisdiction of the Court is specifically pointed out in the act of Parliament, and it furnishes the only intelligible and uniform rule of practice. In *Redpath v. Williams* (a), sending process by the post in a letter, which the defendant refused to take in, was held not to be good service, although the refusal might have been wilful, and was accompanied with a long avoidance of service. In *Digby v. Thomson* (b), which was subsequent to *Rhodes v. Innes*, Taunton, J., held that no difficulty in effecting personal service would dispense with it. *Thompson v. Phenev* (c), in which *Rhodes v. Innes* was referred to, is expressly to the same effect; and there Paterson, J., stated that all the other Judges were of opinion that there ought to be an affidavit of personal service to entitle the plaintiff to file common bail, and said, "Personal service may be where you see a person, and bring the process to his notice." The true principle is stated by Alderson, J., in *Phillipps v. Ensell*, where he says, "Here it must be presumed that the affidavit of service was in the usual form, and therefore there is a *pristine affidavit of service*; and the defendant does not swear that he did not

(a) 3 Bing. 443; 11 Moore, 333.

(b) 1 Dowl. P. C. 363.

(c) *Ib.* 441.

get the writ." But in this case the affidavit has altogether omitted to refer to the word *personal* with respect to the service. If the deponent considered the service personal according to his conscience and belief, he should have so sworn, within the words of the statute.

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LORD ABINGER, C. B.—We should think it right to give this case further consideration but for the decided cases which have been referred to. It is very true that the words of the act are as has been stated by Mr. *Mansel*; but what shall be deemed personal service the act has not specifically defined. Suppose the defendant, in answer to a letter, acknowledged the receipt of the writ, would that be sufficient? In one sense, that would not be personal service. So, again, if the party receiving throws down the writ, and sees the defendant pick it up, that would but be personal service in one sense; but one cannot doubt that it would be equivalent to all that the act of Parliament intended. Here, the plaintiff makes a circumstantial affidavit, from which it is fair to infer that the defendant did get the process. In answer to it, the defendant ought at least to shew that she had not seen the writ, or that the affidavit on the other side was not true; but she does not venture to swear that she had not full knowledge of the process. It seems to me that all that the statute requires is, that the Court shall be made apprised of circumstances which shew that the party had possession of the process. *Rhodes v. Innes* is an authority to that effect: in that decision I concur, and think, therefore, that this rule ought to be discharged.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged with costs.

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JENKS and Another v. TAYLOR.

If a defendant seeks to enter a suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a Court of Requests, he cannot at the same time have the costs of issues, which have been found in his favour, taxed for him in the superior Court.

A Court of Requests Act required that persons inhabiting within the town of *Birmingham*, or using or frequenting the markets there, or working or seeking a livelihood, or in any way trading or dealing within the same, should be sued for debts under

5*l.* in the Court of Requests:—*Held*, that such “using or frequenting the markets,” or “trading or dealing,” must be for the purpose of substantially obtaining thereby the party’s whole livelihood.

ASSUMPSIT for goods sold and delivered. Plea, as to 1*l.* 15*s.*, payment into court; as to 12*s.*, a set-off. The replication, as to the first plea, alleged damages *ultra*; and denied the set-off. At the trial before the undersheriff of *Worcestershire*, the plaintiff had a verdict on the first issue for 17*s.*

Humfrey, on a former day in this term, applied for a rule to enter a suggestion on the roll to deprive the plaintiff of costs, on the ground that the action ought, under the *Birmingham* Court of Requests Act, 47 *Geo.* 8, c. 14 (*a*), to have been brought in the inferior court. He sought also to have the defendant’s costs on the second issue taxed for him; but the Court said that if the defendant was desirous of keeping the case in this court for one purpose, he must do so for all; and if he took it away, he must take it with all its legal consequences. On the former point, the defendant’s affidavit stated that he sought his whole livelihood by manufacturing bricks at *Balsall Heath*, about a quarter of a mile from the hamlet of *Deritend*, and selling the same in the town of *Birmingham*.

(*a*) Sect. 12 of which enacts, that any person, having any debt or balance of account or otherwise, not exceeding the value of 5*l.*, owing to him “by or from any person whomsoever, inhabiting, residing, or being within the town of *Birmingham* and hamlet of *Deritend*, or keeping or using any house, coach-house, wharf,

quay, lodging, shop, shed, stall or stand; or using or frequenting the markets there; or working or seeking a livelihood; or in any way trading or dealing within the same,” may sue for it in the Court of Requests: and sect. 17 deprives of costs such plaintiffs suing in any other court.

ham; that, at the time of the issuing of the writ, and for some years previously, he kept and used part of a house in *Cheapside*, in *Birmingham*, in the occupation of one *Richard Taylor* (for which he regularly paid a compensation), where he daily attended for the purpose of receiving orders, keeping his books, and transacting his business of a brick-maker; and that he regularly used and attended and frequented the markets in *Birmingham*, for the purpose of selling his bricks and commodities, and buying materials for carrying on his business; and that for some years past he had regularly attended at *Birmingham* every day in the year, except *Sundays*, for the purpose of buying and selling in his trade. A rule having been granted,

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Erle now shewed cause, on affidavits which stated that the defendant was a builder, and made bricks at *Balsall Heath*, which was out of the jurisdiction of the Court of Requests, and sold them there to any person who applied for them, and sent them to other places besides *Birmingham*; that he had built some houses at *Balsall Heath*, and that the sand, which was the subject of the sale to him by the plaintiffs, and for the price of which this action was brought, was used in building them; that the defendant, as the deponents believed, did not use or frequent the markets at *Birmingham* more than any other person living in the neighbourhood, and had, on many occasions, been absent for days together; that the house in *Cheapside* was a shoe-maker's shop, kept by a relative of the defendant, and there was no appearance of any office or other place of business there, nor any name or sign of the defendant.—On these affidavits, *Erle* contended, that, as it appeared that the defendant did not obtain, substantially, his whole livelihood within the inferior jurisdiction, and did not regularly frequent the markets for the purpose of substantially obtaining his living by

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trading or dealing therein, he was not within the benefit of the act; that the latter words of the clause, as to the trading and dealing in the town, must have the same construction as the former, viz. a trading and dealing for the purpose of obtaining the party's livelihood, so as to make it the proper place in which to seek him; otherwise they might be made to comprehend almost every person travelling northward. He referred to *Stephens v. Derry* (a), *Reeves v. Stroud* (b), and *Double v. Gibbs* (c).

Humfrey, in support of the rule, urged that there was no sufficient contradiction of the positive affidavit of the defendant; and that the words "trading and dealing therein" did not require that the defendant should transact *all* his business within the jurisdiction.

ALDERSON, B.—Do you mean to say that a tradesman, living in *London*, who sends his man to *Birmingham* with his goods, which is trading and dealing there, is within this act? So, as to the using and frequenting the markets—that, too, must be taken in connexion with the other words, and must mean that it is the market by attending which he substantially gains his whole livelihood.

Rule discharged.

(a) 16 East, 147.

(b) 1 Dowl. P. C. 399.

(c) Ib. 583.

BERNARD v. TURNER.

A Court of Requests Act deprived of costs a plaintiff who should not recover to the

amount of 5*l.* against a defendant resident within its jurisdiction:—*Held*, that the act applied to a case where such defendant pleaded payment into Court, and the plaintiff replied damages *ultra*, and recovered on that issue less than 5*l.*

ASSUMPSIT for work and labour.—The defendant pleaded payment into court of the sum of 3*l.* 10*s.*, to which the plaintiff replied damages *ultra*. The cause was

tried before the under-sheriff of *Warwickshire*, when the plaintiff had a verdict for 1*l.* beyond the sum paid into Court. On a former day in this term, *Erle* obtained a rule to deprive the plaintiff of his costs, under the act referred to in the preceding case, the 47 *Geo. 3*, c. 14, s. 17, on an affidavit that the defendant was a resident in the town of *Birmingham*.

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Kelly shewed cause, and objected, first, that the act was not applicable to a case where there was on the record a plea of payment into Court. It was clear, that, if the plaintiff had accepted the sum paid into court in satisfaction, and discontinued the action, he would have been entitled to his costs under the rule of *Hilary* Term, 4 *Will. 4*, s. 19: and it could not make any difference in principle that the plaintiff had replied to the plea, and ultimately recovered on the same issue. A defendant is not entitled to costs, under the 43 *Geo. 3*, c. 46, where money was paid into Court, which the plaintiff took out. *Rowe v. Rhodes* (a). [*Alderson, B.*—This is like the case of a plea of tender. Suppose that issue were found for the plaintiff, would it entitle him to his costs notwithstanding this act of Parliament?] He next objected, that the act did not apply where the case was tried before the sheriff.

Per Curiam.—That objection has been already overruled in this Court (b). Neither of the grounds suggested forms any answer to this application. The rule must be absolute.

Rule absolute.

(a) 2 C. & M. 379.

(b) *Bond v. Bailey*, 2 C. M. & R. 246.

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A., having reasonable and probable cause for supposing that *B.* made an assault on him with intent to rob him, went for a constable, who, on coming to the place, recognized *B.*, and assured *A.* that he was a respectable man, and that he would be answerable for his coming forward to meet the charge. *A.*, nevertheless, persisted in giving *B.* into custody, and on the following day preferred the same charge against him before a justice, who dismissed it. In an action by *B.* against *A.* for maliciously and without probable cause making such charge before the justice, the Judge stated to the jury, that the plaintiff had reasonable and probable cause for suspicion in the first instance, but that he thought that, on the explanation given by the constable, that reasonable and probable cause ceased; and that if the jury were of opinion that the defendant was satisfied with such explanation, but persevered in the charge from obstinacy or wounded pride, they should find for the plaintiff:—*Held*, that this direction was wrong; for that, as the facts remained unaltered, the representation of the constable could not take away the reasonable and probable cause afforded by those facts.

CASE for maliciously and without probable cause causing the plaintiff to be taken into custody, and charged before the Mayor of *Leeds* with an assault on the defendant with intent to rob him. Pleas, *first*, not guilty; *secondly*, a denial of any damage sustained by the plaintiff. At the trial before Lord *Denman*, C. J., at the last *York* Assizes, the facts appeared to be as follow:—

The plaintiff, a respectable farmer, was waiting at the foot of *Kirkstall Bridge*, near *Leeds*, at 11 o'clock on the night of the 11th of *August* last, for the *York* mail, by which he intended to go to *York*; his servant-man being with him, and his horse tied to the turnpike gate. A drunken man came up, and leaned against the bridge by their side. About the same time the defendant came across the bridge on horseback, and as he approached the plaintiff, the drunken man sprung into the middle of the road, shouted, and made a motion as if to seize the horse's bridle. The defendant galloped on for a short distance, and met a waggoner coming towards the bridge, with whom he returned, and finding the three persons still on the bridge, called upon the waggoner to assist him in taking them into custody. After some words had passed, the defendant went to fetch a constable, and when he returned the drunken man had gone away. The constable at once recognized the plaintiff, and told the defendant that he knew him well, and that he was a very respectable man, and that he (the constable) would be answerable for his appearance at any time to meet the

charge. The defendant, however, after an ineffectual search for the drunken man, during which time the plaintiff remained at the bridge, insisted on the plaintiff's being taken into custody, offering to pay him 10*l.* in case he was proved to be innocent. He was accordingly taken in charge by the constable, and on the following day brought before the Mayor of *Leeds*, when the defendant preferred his charge against him, and it was dismissed, and the plaintiff discharged out of custody.

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The Lord Chief Justice, in summing up, stated to the jury, that, in his opinion, the defendant had certainly reasonable and probable cause for making the complaint in the first instance to the constable, but that, on the explanation given by the constable, that reasonable and probable cause ceased; that the question of malice then remained to be considered, which, in actions of this nature, was not confined to the ordinary meaning of the word *malice*, but comprehended any improper motive. If, therefore, the jury should be of opinion that the defendant ought to have been, and was in fact, satisfied in his own mind of the plaintiff's innocence, but persisted in making the charge before the magistrate from obstinacy, or feelings of wounded pride, such conduct would amount to malice, within the legal meaning of the term, and the verdict ought to be for the plaintiff; but, if they were of opinion that the defendant made the charge *bond fide*, having reasonable and probable cause for making it, notwithstanding the explanation given by the constable, they ought to find for the defendant. The jury found a verdict for the plaintiff, damages 10*l.*

In *Easter* Term, *Cresswell* obtained a rule *nisi* for a new trial, on the ground of misdirection: against which

Blackburne and *Milner* now shewed cause.—It is submitted that the direction of the learned Judge was right;

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whether the conclusion to which the jury came was the right one is not now in question. At all events, the defendant has no right to complain of the summing up, which was rather prejudicial to the plaintiff than otherwise, since it was assumed against him that there was, in the first instance, reasonable and probable cause for the arrest, which might fairly have been disputed. But even assuming that the defendant was justified in making the charge originally, the action is not brought for that arrest, but for the preferring of the charge before the magistrate. And if the defendant became apprised of the plaintiff's respectability, although after the first transaction, yet, as it was before he made the deliberate charge before the magistrate, he ought to have taken those circumstances into consideration before making so grave an accusation. The question is, whether on the following day, when he made that charge, he had reasonable and probable cause for making it, or was actuated by malice. [*Alderson*, B.—Then, if a man makes a charge before a magistrate, and the accused brings a number of respectable witnesses to prove an *alibi*, is the prosecutor liable to an action if he goes before the grand jury? Lord *Abinger*, C. B.—If a man believes another has had his hand in his pocket, is he liable to an action, because he is assured that the party is a respectable man, which he is not bound to believe, or, believing it, may think it consistent with the truth of his charge? We must assume now that there was probable cause in the first instance; the only question is, whether it continued.] That was a question for the jury. [*Alderson*, B.—Surely the real question is, were the circumstances such as might induce a reasonable presumption that the men intended to rob the defendant; because all the rest is evidence of *malice* if any thing; and though you may infer malice from want of reasonable and probable cause, I never heard that want of probable cause was to be inferred from malice.] It may be inferred from

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any circumstances occurring before the making of the charge, which induce a reasonable inference that the party no longer believed it to be true. Suppose the defendant had put off the charge for a year, though he saw the plaintiff every day during that time, would it not then be a question whether he had reasonable or probable cause for making it? [*Alderson, B.*—In that case it would be reasonable to suppose that he had not made a true charge, but one got up on facts he did not himself believe.] But it is assumed that in such case he proved all the facts. [*Alderson, B.*—In *Venafrá v. Johnson* (a), where the defendant had charged the plaintiff with threatening his life, it was held that it ought to have been left to the jury whether the defendant really believed that his life was in danger; but that case was very different from the present.] The whole circumstances here formed one and the same transaction from beginning to end; the case depended on a chain of facts, all of which bore on both the legal questions in the case. Being a mixed question of law and fact, the learned Judge was right in submitting the whole circumstances to the jury, for them to judge of the reasonable and probable cause; *M'Donald v. Rooke* (b), *Nicholson v. Coghill* (c); and the jury were well warranted in the conclusion they drew from them. [*Alderson, B.*—All the principles applicable to the case are beautifully laid down in *Johnstone v. Sutton* (d).]

Cresswell and *Addison*, in support of the rule.—The error of the learned Judge in this case has arisen from a not unfrequent source of error in cases of this class—the not keeping the two questions of law distinct in his mind. The question of reasonable and probable cause, as contra-distinguished from that of malice, ought not to have been left

(a) 10 Bing. 301; 3 M. & Scott, 847.

(b) 2 Bing. N. C. 217; 2 Scott, 359.

(c) 4 B. & C. 21.

(d) 1 T. R. 544.

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to the jury (a). In truth, neither the judge nor the jury in this case decided on the want of probable cause, for it was mixed up in the direction with the question of malice; the perseverance of the defendant in this charge was treated as showing a want of probable cause, when it could only be evidence of malice. It is erroneous to suppose that the question of probable cause is a question for the jury, without qualification. It is a mixed question only in this sense—that the existence or non-existence of probable cause must result from facts, and on these facts the jury are to decide, the Judge deciding on the law. [Lord Abinger, C. B.—May not one of those facts be, what impression was really made on the defendant's mind?] That goes only to the question of malice, not to that of probable cause. [Lord Abinger, C. B.—Suppose the party has clearly, at the moment, probable cause to believe that a man who robbed him was his servant, but on going home he found him with a broken leg, which had been bandaged for a week, could you say in that case there was probable cause?] There, it could not arise out of a *real* state of facts, as here, but merely out of what the party had wrongly imagined to be facts. [Alderson, B.—You have a right to add subsequent facts to the facts previously existing, and see whether the whole together make up a reasonable and probable cause. Suppose the defendant had found the plaintiff lying paralytic on the bridge, unable to move or to have taken part in any attack; there might be reasonable and probable cause for coming back, but would there be for charging him?] The objection is, that the summing up supposes the probable cause removed by circumstances which could only legitimately bear on the question of malice. The state of the facts remains the same, and it is no question for the jury what was the defendant's *opinion* on them. If it were so,

(a) 1 Camp. 206, n.

nobody would venture to prosecute under such circumstances. In *Blackford v. Dod* (a), it was contended, as in the present case, that the question was whether the defendants *believed* they had probable cause for indicting the plaintiffs; but the Court held that that was no question for the jury, the facts being undisputed. *Venafrá v. Johnson* is quite distinguishable; there was there necessarily a question whether the words used by the plaintiff amounted in fact to a threat, and also whether the defendant so understood them; because if they did not amount to a threat, there was no reasonable or probable cause; and if he *boná fide* believed them to amount to it, there was no malice. [Lord Abinger, C. B.—There, the very nature of the charge consisted in the impression made on the defendant's mind; what he believed was part of the charge itself.] Even if the defendant doubted or disbelieved the facts himself, yet, if they constituted a probable cause, he had a right to call on the proper tribunal to investigate them.

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LORD ABINGER, C. B.—I think there ought to be a new trial. It is certainly a case of some nicety, as are most of the cases in which the questions of probable cause and of malice are mixed together: yet there is no doubt as to the principles of law by which such cases are governed, and they cannot be better laid down than in the case of *Johnstone v. Sutton*. To support an action of this kind, there must be both malice in the defendant, and a want of reasonable and probable cause. It is admitted that even if there be excessive malice, if it is combined with probable cause, the action cannot be supported. So also, it is admitted that a total want of probable cause is sufficient evidence from which the jury may infer malice, inasmuch as in such case the party could have no ground for proceeding

(a) 2 B. & Ad. 179.

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in the charge but a malicious one. But, on the other hand, from any degree of malice you cannot infer a want of probable cause: that stands upon a class of facts to be looked at by themselves. Here, the Lord Chief Justice appears to have thought—we must so take it on the report—that the circumstances originally shewed the existence of probable cause: but then he seems to have gone a step further, and said, that, after the constable came and gave so satisfactory an account of the plaintiff, the probable cause of suspicion was removed and ceased to exist. If he meant to say that the constable's statement so qualified the original circumstances as to take away the probable cause, I think that was certainly a misdirection; because, the facts remaining the same, the evidence of the character or quality of the party cannot remove the probable cause afforded by them, however it may weaken the inference to be drawn from them. However such a representation might affect the mind of a reasonable man, we cannot say, if the *facts* are not altered, that the mere attestation of the constable to the respectability of the party can take away the original probable cause. It seems to me that it would be very dangerous to allow such an attestation to affect a prosecutor, who perhaps did not believe, and was not bound to believe it. If, therefore, the Chief Justice meant to say this, I think it was a miscarriage. But, from looking at his notes, I should collect that he appeared to think also that as the representation sufficiently removed the probable cause, all he should leave to the jury would be the question of malice; and that, if the defendant ought to have been satisfied with the representation, the jury would infer malice. If that was his lordship's opinion, I should say that there also he was wrong. To derive from a representation as to the good character of the party—admitting the probable cause—an inference of malice, is saying what no case has yet said. Here there is no pretence for inferring malice but from that circum-

stance. It struck me at first, that, if the subsequent facts were of such a nature as *did* in fact satisfy the defendant, that would take away the probable cause; but, on consideration, there appears to be a plain distinction between a subsequent fact coming to the knowledge of the party, which alters the original state of facts (as in the case which I and my Brother *Alderson* put to Mr. *Cresswell*), and a mere representation of character. If, a party having charged *A.* with an offence, a fact subsequently comes to his knowledge to shew that *A.* did not commit it, that may properly be said to remove the probable cause altogether; but here the facts are unaltered, and all that is communicated is a mere question of character. It would be very dangerous, if, the facts remaining unchanged, and the probable cause being unconnected with the character of the party, a representation as to his character were proper to be left to the jury as taking away that probable cause. I am not sure that it would not apply to every case where a man is acquitted of an offence on evidence which was given before the magistrate, and which it may be said the prosecutor ought to have believed. Though character has great weight, it does not alter the facts, but only affects the inference to be drawn from them, and the weight attaching to it; it does not take away the probable cause which arose upon the facts themselves. In this case, therefore, the probable cause remains; and there is no evidence of malice.

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BOLLAND, B.—I am of the same opinion, that there ought to be a new trial. The rule of law applicable to this case is distinctly laid down in *Johnstone v. Sutton*, and recognised in other cases; it was founded on the authority of *Reynolds v. Kennedy* (a), and has never been impugned. One of the grounds of distinction uniformly taken is, that

(a) 1 Wils. 232.

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probable cause is a mixed question of law and fact. That rule guided the Court in deciding *Venafræ v. Johnson*. It was clearly a question for the jury in that case, in what sense the words were used; and the evidence shewed that, taken in connexion with the surrounding circumstances, it was quite impossible that the defendant could have believed that there was any truth in the plaintiff's threat, and therefore there was no probable cause for the arrest. But this case does not move upon the same facts: here it is admitted that there was originally probable cause; and it is only on the representation of the constable as to the plaintiff's character, that we are called upon to say that the defendant had no probable cause for supposing the parties meant to attack him. *Venafræ v. Johnson* is therefore no authority in this case; and I concur, on the grounds stated by my Lord, that there ought to be a new trial.

ALDERSON, B.—I am also of opinion that there should be a new trial. It appears that the circumstances proved amounted, in the Chief Justice's mind, to sufficient proof that there was originally reasonable cause for the defendant to believe that the three men meant to rob him. Then, upon the subsequent representation, his lordship appears to have thought that if it were established to the satisfaction of the jury, it was sufficient to take away that reasonable cause. But the new facts, in order to have this effect, ought to be such as either altered the original facts, or as, being added to the original facts, made them impossible to have happened; as in the case I put of a paralytic man—there could be no probable cause for charging him with doing that which must have been done by a strong and active man. Here, however, the facts remain the same; the inference to be drawn from them only is affected by the representation of character; the cause of suspicion remains the same, only the inference is weakened in the judgment of the persons who are ultimately to decide

upon it; the original cause requiring that ultimate decision still remains. With respect to the question of malice, if the defendant went on, though believing that there was no reasonable or probable cause, I should doubt whether it might not properly go to the jury whether his conduct was not malicious. If he was in fact satisfied with the representation, the jury perhaps might fairly infer that he could only be actuated in going on by malice.

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GURNEY, B.—I am of the same opinion; but I expressly confine my dissent from the ruling of the learned Chief Justice to the question of reasonable and probable cause. He laid it down that there was originally probable cause; but he seems to have said that the subsequent circumstances had the effect of removing it. In that I do not concur with him; it seems to me that the original facts were unaltered, and the probable cause remained the same.

Rule absolute.

WARNER and Others v. M'KAY.

ASSUMPSIT for goods sold and delivered. Pleas, as to all except 85*l*, *first, non assumpsit; secondly,* payment; *thirdly,* that the plaintiffs sold the goods in the declaration mentioned through the agency of certain persons, to wit, Messrs. *Badenoch & Jenkinson*, at *Liverpool*, who, at the time of the sale and delivery thereof, were

A factor was employed to sell a cargo of goods consigned to him, and on the 6th of *February* sold to *A.* one parcel of the goods, and delivered to him an invoice in his own

name. On the 13th, *A.* applied to purchase another parcel, but some difference occurring as to the price, the factor said he must write to his principals. He did so, and on the 20th informed *A.* of their answer. *A.* bought the goods at the price named by the principals, and the factor delivered to him an invoice and a bought note in the names of the principals; the payment to be at four months in cash. On the same day, and on other occasions within that period, *A.* made payments to the factor, not expressly on account of these goods. It appeared that it was the factor's practice, when he sold goods on his own account to pay himself advances, to deliver an invoice in his own name; when he sold merely as a broker, to deliver a bought note. In an action by the owners of the goods against *A.* for the price of the parcel sold on the 6th *February*, the jury found that the factor communicated to *A.* that he sold the goods for other persons as principals, but that *A.*, until the 20th *February*, *bona fide* believed that he sold to pay himself advances; and that, using the ordinary precaution of merchants, *A.* was not bound to make further inquiry:—*Held*, that *A.* was entitled to set off in this action the payments made by him to the factor.

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the factors and agents of the plaintiffs, and intrusted by them, as such factors and agents, with the said goods, and with the consent of the plaintiffs, sold them to the defendant in their own names, as the true and sole owners thereof, and then appeared to be the true and sole owners by the plaintiffs' consent; and that the plaintiffs did not appear to be the proprietors or owners of the said goods, or interested therein; and that the defendant bought them of *Badenoch & Jenkinson* as their own goods, and did not know, and had not the means of knowing, that the goods belonged to the plaintiff. The plea then averred that *Badenoch & Jenkinson*, at the time of the said sale, were indebted to the defendant in a large sum of money, out of which he proposed to set off the price of the goods. *Fourthly*, that the defendant, having purchased of *Badenoch & Jenkinson* under the circumstances mentioned in the preceding plea, paid them for the goods by his acceptance. The defendant lastly pleaded payment into court of the 85*l.* The plaintiff denied the payment as alleged in the second plea; to the third and fourth pleas, he replied *de injuria*; and to the last plea, acceptance of the 85*l.*, in satisfaction of that amount. At the trial, before *Parke, B.*, at the last *Liverpool* Assizes, it appeared that the plaintiffs, Messrs. *Warners*, were wholesale grocers in *London*, and had shipped to *Liverpool*, at the latter end of the year 1834, a cargo of currants, part of which were damaged. The plaintiffs employed Messrs. *Badenoch & Jenkinson*, brokers in *Liverpool*, to dispose of the cargo, and the bills of lading were indorsed to them. On the 6th *February*, 1835, *Badenoch & Jenkinson* sold the damaged portion of the currants to the defendant, a grocer in *Liverpool*, for 248*l.*, and delivered to him an invoice in their own names. On the 13th of *February* the defendant applied to them to purchase a further parcel, and offered a certain price. *Badenoch & Jenkinson* said they must write to their principals, and a few days afterwards

communicated to him the plaintiffs' answer, requiring a higher price. The defendant agreed for the purchase at that price, and on the 20th a bought note and invoice, in the names of the plaintiffs as the sellers, were delivered to him by *Badenoch & Jenkinson*. The payment for both parcels was to be in cash at four months. On the same 20th *February*, *Jenkinson* applied to the defendant to accept a bill for 200*l.* (not expressly on account of these goods). He did so, and made also other advances to *Jenkinson*, which covered the price of the first parcel sold on the 6th *February*, except the 85*l.* paid into Court. The defendant paid the plaintiffs the price of the second parcel pursuant to his contract. It was proved that *Badenoch & Jenkinson* sometimes sold goods on their own account, to pay themselves advances, and sometimes as brokers; and that in the former case it was their practice to send invoices in their own names; in the latter case they delivered also bought notes. It appeared that the plaintiffs were indebted to *Badenoch & Jenkinson* (but not to what extent), in respect of advances made on these goods. The question between the parties in the cause was, whether the defendant was entitled, as against the plaintiffs, to deduct the sum paid by him to *Badenoch & Jenkinson* on the bill of exchange, and the other monies advanced by him to them. The learned Judge told the jury that the bill could not be considered as *payment* for these goods; but that if they were of opinion that *Badenoch & Jenkinson*, who stood in the character of brokers, sold the goods in question on their own account, and that the defendant *bonâ fide* believed they had authority to do so, then the plaintiffs were bound by all the equities which existed against *Badenoch & Jenkinson*, and consequently must allow the defendant to set off the amount of his advances to them against the price of the goods. The jury found that they believed *Badenoch & Jenkinson* had communicated to the

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defendant that they sold the goods for other persons as principals, but that the defendant, on the 6th of *February*, and until the 20th, *bond fide* believed that he was purchasing from *Badenoch & Jenkinson*, and that they sold to pay themselves advances; and that, using the ordinary precaution of merchants, he was not bound to make any further inquiry on the 20th, when he accepted the bill. The verdict was thereupon entered for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for 163*l.*, if the Court should think them entitled, under the circumstances, to recover.

In *Easter Term*, *Cresswell* obtained a rule *nisi* accordingly, urging that the learned Judge had misdirected the jury; against which, in this term,

Alexander and *Crompton* shewed cause.—The defendant was entitled, under all the circumstances, to take advantage of his payments to *Badenoch & Jenkinson*. The important facts in the case are, the different modes in which *Badenoch & Jenkinson* were in the habit of dealing when they sold as brokers, and when as principals; thus holding out to purchasers the two different characters in which they stood; and the fact that, in this instance, they adopted the former mode of dealing as to the one parcel of goods, the latter mode as to the other. There is no reported case which is precisely applicable to the present, but it comes within well defined and understood rules of law. Ever since the case of *Drinkwater v. Goodwin* (a), the law has been understood to be, that, even as between a factor and his principal, the former has a right to sell in his own name as principal, and has a lien on the goods, and on the price of them, for a general balance of accounts. His right to sell is a consequence of his relation

(a) Cowp. 251.

as *factor*, and within the scope of his authority, being trusted with the possession of and control over the goods, the *indicia* of the property. A *broker*, on the other hand, has not the possession of the goods, and has no right to sell in his own name, and therefore the purchaser who pays to him does so at his own peril; but the purchaser has a right to consider the *factor* as the principal, unless he discloses that he is making the contract, not on his own account, but merely as the agent of his principal. *Baring v. Corrie* (a), *Hudson v. Granger* (b), *Carr v. Hinchliff* (c). The only question is, whether the communication made by *Badenoch & Jenkinson* to the defendant, that the goods belonged to the plaintiffs, is sufficient to take this case out of the general rule of law. Now, it was a communication of a fact perfectly consistent with the right of the factor to deal in his own name; it gave no information from which the purchaser could infer that the factor was acting beyond the scope of his authority, and leaves the case, as against the vendor, where it was before. Whether the defendants knew that the goods belonged to another or not, they knew that the factor had a right to sell them. The question is, was he acting within the scope of his authority? or if not, was any information given to shew that he was acting beyond it? Suppose he had expressly said, "these are A.'s goods, but I have a right to deal with them as factor," would not the purchaser have a right to consider him as the contracting party? What inquiry was the defendant to make?—was he to send to *London* to inquire from the principals? They would have answered, "You ought to know that the factor is dealing with the goods in the ordinary way." And the jury have expressly found that the defendant *bona fide* believed that the factors were selling in their own name to pay advances, and that he was not bound as a merchant to make further

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(a) 1 B. & Ald. 137. (b) 4 B. & Cr. 547. (c) 5 B. & Ald. 27.

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inquiry. They have found, therefore, that he made the payments under a *bond fide* belief that there was such a state of accounts between the factors and the principal, as would entitle the factors to deal with the goods as their own; and the greater or less amount of the debt due from the principal to the factors becomes, therefore, immaterial. *Moore v. Clementson* (a) will probably be relied on by the other side. There, the factor sold the goods without mentioning the name of the principal; but before they were all delivered, one of the defendants (the purchasers) asked the factor's clerk whose goods they were, to which he answered, "*Moore's* ; he is the manufacturer." Under these circumstances it was held, that the buyers could not set off against the principal a debt due to them from the factor. [Lord *Abinger*, C. B.—That case certainly appears more like the present than any other. *Parke*, B.—To make that case good law, you must suppose that the notice was given before there was a binding contract between the parties.] Lord *Ellenborough* so puts it. He says, "There was express notice to the purchaser *before the contract was completed*, that *Green*, in this particular transaction, acted only as a factor. The vendor might therefore interfere at any time *before payment*." So that there was express notice, as to the particular transaction, that the factor sold, not for himself, but for a principal. In *Paley's Principal and Agent* (b), the notice in that case is treated as notice *from the principal*. Whereas *this* was a sale by a party contracting for himself, in his own name; for such is the effect of the evidence, and of the finding of the jury. But *Coates v. Lewes* (c) is, perhaps, the nearest case to the present. There, the sale was made by a *broker* ; but the owner of the goods allowed him to appear in the transaction as a principal, and to sell in his own name; and though the buyers knew him to be

(a) 2 Campb. 22.

(b) P. 431, (3rd edit.)

(c) 2 Campb. 444.

a sworn broker of the city of *London*, Lord *Ellenborough* held them discharged by payment to him. In that case, therefore, the distinction between the broker and the factor vanished, and it came to the very case of a *factor* selling in his own name. There can be no difference whether the party states the goods to be his own by his conduct, or by express declarations. It is a fallacy, therefore, to say that the factors disclosed the name of their principal in this transaction. The *dicta* on that point mean only this—the party must let it be known that the *particular contract* is made for his principal, otherwise the general rule of law applies:—the buyer is led to give credit to the factor by his having the possession of the goods, and holding himself out as the principal; and the party who gives him such a general authority should be the one, as between two innocent parties, to suffer by its consequences.

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Cresswell and *Wightman*, *contrà*.—This motion was founded on the misdirection of the learned Judge, and is therefore not answered by the finding of the jury, which was subsequent to that misdirection. It is submitted, that the learned Judge did not draw from the facts proved the right result of law; and that the defendant was not justified, under the circumstances, in availing himself of his payment to the factors. The point as to the factor's right of lien was not expressly decided in *Drinkwater v. Goodwin*; but if it was, it is submitted that the decision cannot be supported. Though a factor has a claim against his principal, he has no legal right to sell the goods, unless there be a course of dealing to authorize it. Otherwise, where is to be the limit? he may sell to the great injury of his principal. [*Parke*, B.—How is he to reimburse himself for advances? Lord *Abinger*, C. B.—If the principal does not interpose his authority to prevent the sale, and the goods are sold, what then?] Where a principal sends an assorted cargo, with a limit

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as to price, the factor cannot bring the goods into the market against his will, to satisfy his own advances. [Lord *Abinger*, C. B.—He may have no right as between himself and the principal, but that does not bind third parties.] He has no such right, it is submitted, by law or mercantile usage. The ground of decision in the cases which have been referred to on the other side, is substantially the same as that stated in *George v. Clagett* (a), viz. that the purchaser had no notice whatever that the goods did not wholly and absolutely belong to the factor. There is also a second class of cases, which establish that the factor, as such, has a right to sell, and to bargain for payment; and if the purchaser pays *according to the contract*, well; that being a payment within the authority given by the principal. The present case does not fall within *George v. Clagett*, because there was notice of the principals; nor within the other class of cases, because the payment to the parties was not according to the contract. And if the defendant had the means of inquiring whether the factors had a right to sell or not, he was bound to do so. *Prima facie*, they had no right to sell, because they had, and made it known that they had, principals in *London*. As to the finding of the jury, if they had found that there was *no notice* to the defendant of the plaintiffs' right, and that he believed *Badenoch & Jenkinson* were selling for themselves, that would have been different; but the jury had no authority to consider merely whether *Badenoch & Jenkinson* had a right to sell on their own account. The defendant's belief is immaterial, if he had not justifiable grounds for so believing, and had the means of inquiry. If the buyer contents himself with the factor's statement, after notice of a principal, he must take the responsibility: when the factor has communicated that he has a principal, he brings himself for the occasion into the situation

(a) 7 T. R. 359 ; Peake's Addit. N. P. C. 131.

of a broker. If the general payment which appears in this case were sufficient to discharge the purchaser, the question never could have arisen, whether payment had been made *according to the contract*. In *Coates v. Lewes*, the party, though a broker, was in that particular instance selling as a factor generally; it does not appear that there was any information that he was not the principal. *Moore v. Clementson* is strictly in point. So also, an insurance broker who effects a policy *without notice* that it is not on account of his principal, has a lien upon it for his general balance, and a right to apply to the satisfaction of that balance money received upon the policy; *Westwood v. Bell* (a). [Lord Abinger, C. B.—Have you any case where the factor has sold in his own name, with notice to the buyer that he was *a factor*, and payment to him before it was due according to the contract has been set aside?] Such cases have arisen where the factor has *pledged*, but not where he has sold. [*Parke*, B.—Here he sells as his own; but the question is whether the being informed that they were the goods of a principal in *London* ought to have put the defendant on inquiry, so as to make payment to the factors good or not, according as it turned out that they had authority or not.] It is submitted that it ought; the defendant must take the responsibility of what the state of accounts might turn out to be. It may be observed also, that in many of the cases it will be found that the factor was not acting simply as such, but under a *del credere* commission; that may make a great difference, since it renders him absolutely liable to the owner. [*Bolland*, B.—In *George v. Clagett*, the factor was acting under a *del credere* commission, but that was made no ingredient in the judgment.] In *Morris v. Cleasby* (b), Bay-

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(a) 4 Campb. 349.

(b) 1 M. & Sel. 576. But see the same case, on a subsequent discussion, 4 M. & Sel. 566,

where the doctrine that the factor, under a *del credere* commission, is liable absolutely and at all events to the seller, was exploded.

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ley, J., intimates that it makes a difference in the case:
[*Parke, B.*—Lord *Kenyon* says expressly the contrary
in *George v. Clagett* (a).]

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—(Having stated the facts, his Lordship continued:)—The question was, whether the defendant had a right to consider that he had paid the factor for these goods. The jury have found that he had notice that the goods were the plaintiffs', but that he was not bound to make further inquiry. If this were merely the case of a sale of goods by a factor in his own name, there would be no difficulty at all in saying that the payment to him would be valid. The doubt arises from the circumstance that, according to the evidence, the defendant was apprized that the goods belonged, not to *Badenoch & Jenkinson*, but to the plaintiffs. But as it appears that the factors were accustomed to sell in their own names when they had any claim against the owner of the goods, and that they sold these goods in fact in their own names, and after the finding of the jury that the defendant believed they had authority so to sell, and was not bound to inquire further, we see no ground for disturbing the verdict. The rule, therefore, will be discharged.

Rule discharged.

(a) Peake's Addit. N. P. C. 134.

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JOHN JERVIS had obtained a rule *nisi* to set aside the *capias*, and cancel the bail-bond given in this case, on the ground that the affidavit of debt was defective. It was as follows:—"N. T. S., of &c., shipbroker and agent for *James Shepherd* and *E. L. Dickson*, of &c., owners of the ship called the *City of Edinburgh*, of the port of *London*, maketh oath and saith, that *Edward O'Brien* is justly and truly *indebted* unto the said *J. S.* and *E. L. D.* in the sum of 40*l.* for the *hire* of a certain berth on board the said ship, let by the said *J. S.* and *E. L. D.* to the said *Edward O'Brien*, and at his request." A similar application had been previously made to *Parke*, B., at chambers; but his Lordship, on the authority of the case of *Brown v. Garnier* (a), declined to make any order.

An affidavit of debt stated the defendant to be *indebted* to the plaintiffs in 40*l.* for the *hire* of a berth on board a vessel of the plaintiffs, let by the plaintiffs to the defendant at his request:—
Held sufficient.

Alexander shewed cause, and relied on *Brown v. Garnier*. There, the Court of *Common Pleas* held an affidavit sufficient, which stated the defendant to be indebted to the plaintiff for the *hire* of divers carriages of the deponent *hired to and for the use of the defendant*; and said the words were equivalent to saying that the carriages were let to hire to the defendant. That case is precisely analogous to the present.

Jervis, in support of the rule.—This case is distinguishable from *Brown v. Garnier*, because there the words imported that the carriages had been *used* by the defendant; whereas here no more appears than that the berth has been *hired*, or *let*, which is the same thing. Unless the defendant has used it, he is not necessarily indebted to the plaintiffs; at all events, not in the full amount of the passage money, since the plaintiffs may have re-let the berths. [*Parke*, B.—The affidavit states positively

(a) 6 Taunt. 389.

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that he is *indebted*.] That is not of itself sufficient, unless the circumstances stated import a debt. The proper form would have been to allege, that the defendant was indebted for his *passage* in a certain vessel. An affidavit of debt for goods *sold*, not stating that they were delivered, is insufficient; that is an analogous case. In *Mulloy v. Backer* (a), Lord *Ellenborough* says, that except for the purpose of lien, passage money is the same thing as freight. But a plaintiff could not arrest for freight, unless the affidavit alleged that it was due upon goods actually carried.

PARKE, B.—When this case came before me at chambers, I entertained some doubt upon it; but, upon the whole, I thought, and still think, that this affidavit is sufficient. *Brown v. Garnier* is certainly in point, and it was a stronger case than the present. The Court expressly held, that the words there used implied a contract to let to hire. The deponent in this case might be indicted for perjury upon this affidavit, unless it were proved that there was an agreement for the defendant to pay down the passage money before the sailing of the vessel, or at all events before the voyage was completed. There are certainly cases in which the Court has said that the word *indebted* is not enough of itself; but that is where the debt arises by inference of law, or where there is a claim of a debt *solvendum in futuro*, in which case it is necessary to shew that the time of payment has arrived.

BOLLAND, B.—On the authority of *Brown v. Garnier*, I think this affidavit is sufficient.

ALDERSON, B.—It appears to me that the word “indebted” may have full effect given to it, except in the cases pointed out by my Brother *Parke*.

GURNEY, B., concurred.

Rule discharged.

(a) 5 East, 316.

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LYON v. TOMKIES, PITT, and STANDAGE.

CASE.—The first count in the declaration was for distraining goods to an excessive amount for arrears of rent; the second count was for distraining and selling more goods than were sufficient to satisfy the arrears of rent, and the charges of the distress; the third was for selling for insufficient prices. The fourth count was on the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, for not leaving the overplus, after payment of the arrears of rent, and the charges of the distress, in the hands of the sheriff of *Middlesex*, or his under-sheriff, or of the constable of the parish, hundred, or place wherein the distress was taken, for the use of the plaintiff, so being the owner of the goods as aforesaid, although a reasonable time for that purpose had long since elapsed. The defendants *Tomkies* and *Pitt* pleaded, *first*, not guilty; *secondly*, to the first and second counts of the declaration, leave and licence; and *thirdly*, to the fourth count, that, after the satisfaction of the arrears of rent and charges, and before the commencement of the suit, the defendants paid to the plaintiff the overplus, and every part thereof, in full satisfaction and discharge of the cause of action in that count mentioned, and all damages sustained by the plaintiff in respect thereof, which she, the plaintiff, accepted and received in full satisfaction thereof. The defendant *Standage* pleaded separately, *first*, not guilty; *secondly*, that the produce of the sale was not more than sufficient to satisfy the arrears of rent and the charges of the distress. To the plea of leave and licence, the plaintiff replied *de injuriâ*; and she denied the payment and receipt of the overplus in satisfaction.

At the trial before Lord *Abinger*, C. B., at the *London* Sittings after last *Michaelmas* Term, it appeared that the

The *overplus*, which by the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, is directed to be left in the hands of the sheriff, under-sheriff, or constable, on a distress, for the owner's use, means the overplus after payment of the rent and of the *reasonable* charges. Therefore, in an action on the case for not leaving the overplus in the hands of the sheriff, &c., for the plaintiff's use, the plaintiff may question the reasonableness of the charges.

And where the plaintiff herself received from the broker the balance remaining after payment of the rent and the actual charges, making no objection as to their reasonableness:—*Held*, that it was a question for the jury whether she accepted such balance in satisfaction, and if not, whether it was sufficient to satisfy the real balance: but that it was not correct to lay it down as matter

of law, that such payment and receipt substantially satisfied the requisitions of the statute.

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plaintiff, being half a year's rent in arrear for a house occupied by her, the defendant *Pitt*, a broker, was directed by the landlord to make a distress upon the plaintiff's goods. He deputed his clerk, the defendant *Tomkies*, to do it; the distress was accordingly made by *Tomkies*, and the goods were taken to the rooms of the defendant *Standage*, an auctioneer, and there sold by him. The rent in arrear was 35*l.*; the sale produced 59*l.* It was proved, however, that the plaintiff's son, who lived with her, and assisted her in carrying on her business, had desired that all the goods on the premises might be sold (to avoid an extent), and attended at the sale, and bought in some of the lots for the plaintiff. After the sale, he applied to the defendant *Pitt* for an account of the proceeds, and received from him the sum of 6*s.* 3*d.*, the balance remaining after payment of the rent and charges, and gave a receipt for it, making no complaint of any excess in the charges. The plaintiff however now alleged that several of the charges were excessive and irregular. The Lord Chief Baron, on the case being opened for the plaintiff, stated his opinion that the defendant *Standage*, not having been a party in making the distress, was not answerable in this action, at least not jointly with the other defendants, and he was accordingly acquitted.

At the close of the plaintiff's case, it was objected for the defendants that the case could not go to the jury, as against *Pitt* and *Tomkies*, on all the counts of the declaration, and that the plaintiff ought to elect on which count she would proceed. The learned Judge said, the plaintiff was not bound to elect on which count she would proceed, but that she must elect against which defendant she would go, as both the defendants could not be jointly liable on the fourth count. The plaintiff thereupon elected to proceed against *Pitt*, and an acquittal was taken for *Tomkies*. The Lord Chief Baron, in summing up, left it to the jury to say, whether the whole of the goods had or had not been sold

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by the consent of the plaintiff, or of her son as her agent, and whether the sale had been fairly and properly conducted. With regard to the complaint in the fourth count, his Lordship stated it as his opinion, that the statute did not apply to a case where the person distrained upon received the overplus from the party distraining; and as the plaintiff, by her agent, had received it in the present case, she could not complain that it had not been paid over into the hands of the sheriff or constable for her use. On that issue, therefore, he directed the jury to find for the defendant, in case they thought the son was the agent of the plaintiff. The jury found for the defendant on all the issues.

In *Hilary* Term, *Humfrey* moved for a rule *nisi* for a new trial, on the ground of misdirection. *First*, the plaintiff was not bound to elect either on what count or against which defendant she should proceed, until the whole case, on the part of the defendant as well as of the plaintiff, was gone through, and was about to be summed up to the jury. *Secondly*, the payment to the plaintiff herself was clearly not a payment in compliance with the statute; and if it was to be considered as a payment by the defendants to the plaintiff in satisfaction of the cause of action, it ought to have been left to the jury whether it amounted to such satisfaction. He objected also that some of the charges were excessive. The Court refused the rule on the first and last grounds, saying, that this was clearly a case in which the plaintiff was bound to make her election at the close of her own evidence; and that the jury had disposed of the question as to the propriety of the charges. On the second ground a rule was granted, which came on for argument in *Easter* Term.

LORD ABINGER, C. B., having read his notes of the evidence, said—The question in this case depends on the construction to be put upon the statute 2 *W. & M.* sess. 1, c. 5, s. 2. That, however, has been followed by the 11

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Geo. 2, c. 19, s. 19, which, reciting the hardship resulting from the law which made distrainers trespassers *ab initio* by reason of any irregularity in the distress, provides that the party aggrieved by the irregularity shall recover satisfaction for the special damage he shall have sustained, and no more, in an action of trespass or on the case. On the bare question, whether the non-payment of the overplus to the sheriff or constable was any damage to the plaintiff, I should certainly have thought that, after receiving it herself, she could not make out any cause of action on that ground. The case of *Waller v. Rumball* (a), in which the notice of distress was given to the plaintiff instead of being left at the mansion-house, and it was held that this was no special damage, seems to me an analogous case to the present. The service of the notice of distress, too, is a matter preliminary to the sale, and a condition precedent to it, whereas the payment of the overplus is subsequent. It appeared to me, that, as the money got into the plaintiff's hands, and as it was only for her use that it was to be left with the sheriff or constable, the statute was substantially satisfied. I thought, therefore, that she could not maintain the action, unless she shewed on the face of the declaration some special damage which might have resulted from its not being paid strictly according to the statute, as from its not being paid earlier. Here, however, the payment was made on the very day the goods were cleared. I thought the question did not arise, whether the payment was *sufficient in amount*, because the action was only for non-payment of the *overplus*; and if the objection was, that too large deductions were made, the plaintiff ought to have given notice of that before the trial, in order to give the defendants an opportunity to avail themselves of the provision of the statute as to the tender of amends, and then have brought a special

(a) 1 Lord Raym. 53.

action on the case, or an action for money had and received. Probably the jury might have found that the money was not paid *in satisfaction*, if that had been left to them; certainly all I left to them was, whether the plaintiff's son, who received it, was her agent; and then I took it on myself, as matter of law, to say she was not entitled to recover on that count.

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Platt and *Barstow* shewed cause.—The decision at *Nisi Prius* was perfectly correct. It may be assumed, for the purpose of the argument, that the fourth count was the only one in the declaration, and the only plea that of not guilty. Now, on the face of this count, the application of the money, as to the rent and expenses, is admitted to be correct: then it alleges that the surplus is unsatisfied to the plaintiff, and was converted to the defendant's own use. The overplus, on this count, is admitted to have been the sum actually paid over; and that was paid to the plaintiff: the latter allegations, therefore, are negatived by the evidence. But, even supposing those allegations immaterial in proof, *Walter v. Rumball* is a sufficient authority that the payment to the plaintiff herself is equivalent to the payment to her statutory agent. The object of the statute is only that the party who is the owner of the goods shall have the use of the money, just as it is that *he* should have notice of the distress. This is only a substitution of a direct payment to the party in lieu of the legal form of transit to her. Here is an equivalent, by the plaintiff's own act, to that which the statute prescribes. The receipt by her may be said to amount to an admission that it has gone through the legal hands. [*Parke*, B.—How should she have declared, if she intended to question the propriety of the charges?] She should have alleged that, although the reasonable charges amounted to so much, yet the defendants wrongfully paid a certain unreasonable amount, &c. [*Parke*, B.—The question is, whether the over-

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plus after payment of the rent and charges, does not mean the residue after payment of the rent and of the *reasonable* charges. Lord *Abinger*, C. B.—The plaintiff alleges that the overplus is unpaid *to her*; then the question is, whether, after receiving the money and making no objection, and giving no notice afterwards, she must not be taken to have adopted the account.] The allegation as to the *charges*, in this count, must be taken to refer to the monies proved to have been in fact paid. If the plaintiff meant to apply her complaint to the non-payment of the overplus after the *reasonable* charges, she might specify them, and allege that the defendants did not pay over that overplus. [Lord *Abinger*, C. B.—I think it is a question worth consideration, whether, if the complaint be, not that the actual overplus has not been paid—which it has—but that the charges were unreasonable, that ought not to be made the subject of a special action on the case. *Parke*, B.—I certainly cannot find, and cannot recollect any such count; and undoubtedly my impression is, that every thing beyond reasonable charges is included in the *overplus*.] If a sum in the name of an overplus has been offered, and received without objection, and the party can, without taking any other step, bring an action, the provisions of the 11 *Geo. 2*, c. 19, s. 19, will be defeated. [*Parke*, B.—Does not that section apply only to cases of irregularity which would have made the parties trespassers *ab initio*? Does it apply to omissions which give a new remedy—matters within the equity of the statute of *William & Mary*, as the right to receive the overplus?] The power to distrain and sell being a statutable power, is to be strictly pursued in all its terms, and the omission of any one of the conditions imposed by the statute, it is submitted, would make the party a trespasser *ab initio*.

But further, as the sale was of all the goods, by the plaintiff's request, it does not appear that there was any overplus arising from the proceeds of the portion seized

and sold to satisfy the rent: and the plaintiff is bound at all events to prove that there was *an* overplus.

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Humfrey and *Ball*, in support of the rule.—With respect to the last argument, it was a question for the jury, if at all, to what portion of the goods the overplus was referable; and no such question was left to them, or was raised at the trial.

Then, as to the main question in the case; it ought to have been left to the jury to say, whether the plaintiff accepted the balance in satisfaction of the cause of action which had arisen by the non-payment according to the statute. In *Willoughby v. Backhouse* (a), it was held, that the right of action vested in the tenant by an excessive distress made upon him, was not waived by his entering into an arrangement as to the sale of the goods; because, as *Bayley, J.*, observed, “it gives no satisfaction to the tenant; he makes no stipulation not to sue for that which had been done.” So here, a right of action had vested in the plaintiff. [Lord *Abinger*, C. B.—Not till the balance was ascertained.] At all events as soon as a reasonable time had elapsed. [Lord *Abinger*, C. B.—No question was made as to the reasonableness of the time, nor could it, for the payment was made *instantly*.] Then, the plaintiff is entitled in this form to question the reasonableness of the charges. Such a count as is suggested to meet that objection is not to be found among the precedents. How otherwise is the propriety of the charges to be questioned but by alleging the non-payment of the proper overplus? In *Hills v. Street* (b), it was held that the amount of irregular charges might be recovered back by the tenant, although he had requested the broker not to sell, and had engaged, as a condition of his forbearance, to pay his charges.

(a) 2 B. & C. 821; 4 D. & R. 539. (b) 2 M. & P. 96; 5 Bing. 37.

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[They were about to enter on an examination of the propriety of the charges, when Lord *Abinger*, C. B., said,—Is a minute inquiry into the reasonableness of the actual charges necessary? The question is, whether you can go into it all. No doubt, if the charges are a subject of inquiry at all, the jury are the proper tribunal to pronounce upon it. *Parke*, B.—If the cause goes down again, it will be for the jury to say, whether the plaintiff's acceptance of the 6s. 3d. was not an admission that that was the real balance.]

The Court recommended a *stet processus*, and the case stood over accordingly; but no arrangement was effected, and in this Term

LORD ABINGER, C. B., said:—In this case the Court are disposed to direct a new trial, on condition that the plaintiff enters a *nolle prosequi* as to the defendants *Tomkies* and *Standage*. It is the opinion of the majority of the Court—I will not say it is not mine, although I have some doubt upon it—that the evidence ought, on the fourth count, to have been submitted to the jury. The question for the jury will be, whether the plaintiff received the balance in satisfaction; and if not, whether it was sufficient in amount to satisfy the real overplus. It will of course be open to the plaintiff to go on any of the counts in the declaration.

Rule absolute accordingly.

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ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 25*l.* dated 17th *July*, 1830, drawn by one *Needham*, payable two months after date to his order, indorsed by *Needham* to one *Robertson*, and by him to the plaintiff. Pleas, *first*, that the acceptance of the defendant, and the several indorsements by *Needham* and *Robertson*, were without value or consideration; *secondly*, that the bill was indorsed to and received by the plaintiff after it became due. To the first plea, the plaintiff replied that the indorsement by *Needham* to him was for value and consideration; and he denied in terms the allegation in the second plea. At the trial before *Gurney*, B., at the *Middlesex* sittings in this term, the learned Judge ruling, in conformity with the decision in *Mills v. Barber* (a), that the defendant was bound to begin, the plaintiff offered no evidence. For the defendant, it was proved that in the month of *May*, 1830, *Robertson*, being in want of money, wrote to the defendant, requesting him to lend him his acceptance; and a bill for 20*l.* was thereupon drawn by *Needham* on the defendant, and indorsed by *Needham*, for *Robertson's* accommodation, at two months' date, which fell due on the 17th *July*. On that day, *Robertson* sent it in a letter to the defendant, requesting him to renew it; and the bill on which this action was brought was drawn and accepted accordingly, as a renewal of the former. No notice was given to *Needham* of the dishonour of the bill. It appeared that there were subsequently some proceedings in Chancery respecting the guardianship of the defendant's child, in consequence of which a quarrel ensued

In an action by the second indorsee against the acceptor of a bill of exchange, at two months' date, the defendant pleaded that the bill was indorsed to the plaintiff when overdue. It was proved for the defendant it was drawn and accepted for the accommodation of *R.*, the first indorsee, in *July* 1830. *R.* was then an intimate friend of the defendant, but they afterwards quarrelled. No notice of its dishonour was given to the drawer. After the action was brought (in the present year) the defendant's attorney applied to the plaintiff to settle it: the plaintiff said that *R.* owed him much more money, and that as he had given value for the bill, he must go on with the action. The plaintiff did not call *R.* at the trial: —*Held*, that there was evidence to go to

the jury, that the bill was transferred to the plaintiff after it became due.

(a) Ante, p. 425. The present case had also been before moved in *Easter* term, and a new trial granted, on the same point.

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between *Robertson* and the defendant, who had previously been on intimate terms. The defendant's attorney stated, that, after the present action was brought, he called upon the plaintiff with the view of settling it, and told him if he would sue *Robertson* on the bill, the defendant would indemnify him against the costs of the action. The plaintiff, after much negotiation, said, as he had given value for the bill, he must go on with the action; he said *Robertson* owed him much more money. *Robertson* was not called for either the defendant or the plaintiff. The learned Judge, in summing up, remarked strongly on the circumstance that the plaintiff did not call him, and observed that the fact of the bill not being sooner put in suit led to an inference that it had remained, after it was due, in the hands of *Robertson*, for whose accommodation it was made, and whose duty it was to take it up, until his quarrel with the plaintiff; and he left it to the jury to say whether it came into the plaintiff's hands after it was due. The jury found that it did, and the verdict was therefore entered for the defendant on the second plea.

John Jervis now moved for a rule *nisi* for a new trial, on the ground of misdirection.—The evidence given for the defendant did not in any respect vary the relative situations of the parties from that which appeared upon the record itself, and upon which, therefore, according to the previous decision of the court, the plaintiff was entitled to a verdict. The staleness of the bill appears on the face of the record; from that alone no inference could be drawn against the plaintiff. Many reasons might exist to induce a plaintiff to forbear suing for a time. And as *Robertson* owed the plaintiff more money, he was not bound to decrease his means by suing *him*. The letters given in evidence carried the case no further; they proved only that the acceptance and first indorsement were without consideration, which the replication admitted. The conversation between the defendant's attorney and the plaintiff

proved that the indorsement to the plaintiff *was* for value. And it could be no question for the jury who was to call *Robertson*. The plaintiff, therefore, was equally entitled to recover as if no evidence had been given on either side, as on the former trial. The inferences drawn against the plaintiff were unsupported by facts: the presumption, if any, ought to be that the bill had passed regularly.

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LORD ABINGER, C. B.—I think the learned Judge was quite right: I think there was sufficient evidence, unless the plaintiff called *Robertson*, to sustain the case of the defendant, that the bill was not only an accommodation bill, but was indorsed to the plaintiff after it was due. The very circumstance of the action not being brought for five years after the bill became due, affords a presumption that the party for whose accommodation it was made took it up according to his contract. Then it appears, that, when it became due, *Robertson* and the defendant were friends; they subsequently quarrel, and then, five years afterwards, a stranger brings an action against the defendant on the bill: and the very circumstance to which Mr. *Jervis* has referred in support of his view of the case, namely, that *Robertson* was much in debt to the plaintiff, affords a reason why, under pressure, *Robertson* might transfer the bill to him after it was due. All these circumstances constituted a *prima facie* case for the defendant. Then who was to call *Robertson*? Not he who alleges that he was guilty of fraud, but he who affirms that he transferred the bill regularly. That, however, was not a question of law; and the substantial meaning of the learned Judge's charge is only that the *prima facie* case for the defendant is strengthened by the plaintiff's refusal to call *Robertson*.

PARKE, B.—I quite concur that there was sufficient

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evidence for the jury, on the second plea, in favour of the defendant. On the first plea, there is no question that the plaintiff was entitled to a verdict. On the second, also, both sides agree that the burthen of proof was on the defendant; and upon that, the presumption in the first instance is, that the bill was negotiated before it became due; but the question is, whether there was not *prima facie* evidence for the defendant to shew the contrary. The first circumstance is, that the bill has not been put in suit for a period of upwards of five years. I am not prepared to say that this alone would be enough to cast an imputation on the bill, and raise an inference that it was transferred when over due. But it appears besides, that the bill was drawn and indorsed by *Needham* for the accommodation of *Robertson*; he therefore ought to have taken it up when due: it becomes due, and no notice of its dishonour is given to *Needham*. If it had been in the plaintiff's hands, it is probable he would have given notice of its dishonour. Then, as *Robertson* was to take it up, the presumption is that he performed his contract; and that presumption is strengthened by the consideration that when it became due he and the defendant were friends, and that they afterwards quarrelled; there was therefore a motive for then turning over the bill, in order to annoy the defendant. All these were fair circumstances to leave to the jury, as affording an inference against the plaintiff. He might have called *Robertson*, or the defendant might have called him; but, if the defendant called him, it was to prove him out of his own mouth guilty of fraud, and when there was proof enough, independently of his evidence, to raise a *prima facie* case against the plaintiff. There appears no misdirection or failure on the part of the learned Judge; there was certainly a case for the jury, and he left it to them; and I quite agree that it was much more reasonable to expect that the plaintiff would rebut

the presumption by calling *Robertson*, than that the defendant should attempt to strengthen it by calling him.

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BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

STOBART and Others (Executors of WILLIAM STOBART) v.
DRYDEN.

COVENANT on a mortgage deed for the payment of 800*l.* with interest at 4*l.* *per cent.* Pleas—first, *non est factum*; secondly, that the deed was executed by the defendant to secure the sum of 700*l.* only, and that the said sum was, after the execution thereof by the defendant, altered by one *M'Cree*, one of the attesting witnesses to the execution thereof, without the consent, privity, or knowledge of the defendant, to the sum of 800*l.*: which was denied by the replication. At the trial before Lord Abinger, C. B., at the last Summer Assizes for *Durham*, the deed on which the action was brought being produced in evidence, there appeared to be two attesting witnesses to its execution by the defendant; one named *Potts*, the other *M'Cree*. *M'Cree* was dead; but *Potts* being called, denied all recollection of his having attested such a deed, and stated that he doubted the genuineness both of his own signature and the defendant's. A witness was then called, who proved the handwriting of *M'Cree*, and witnesses spoke also to their belief of the genuineness of the other signature; and the deed was read. It contained a covenant by the defendant for the payment of 800*l.*, which sum was written over an erasure. It was proved that application was first made for the sum of 700*l.*, which was afterwards increased to 800*l.*; and that the attorney of the mortgagee paid the latter sum into the hands of *M'Cree*,

Covenant on a mortgage deed. Pleas—*non est factum*, and that the deed had been fraudulently altered after its execution, by *A.*, one of the attesting witnesses. The execution of the defendant appeared to be attested by two witnesses, *A.* and *B.* *A.* was dead. *B.*, being called, denied all recollection of having attested the deed, and doubted the genuineness of his own and the defendant's signatures. The handwriting of *A.* and of the defendant was then proved by other witnesses. It appeared that the sum secured was written over an erasure:—*Held*, that the defendant could not give evidence of declarations by *A.*, tending to shew that he had forged or fraudulently altered the deed.

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who was the attorney for the defendant, on his producing to him the deed executed by the defendant. For the defence, it was proposed to give evidence of certain letters and statements of *M'Cree*, subsequent to the execution of the deed, which, although they did not in terms admit that the deed was a forgery, contained admissions that he had been guilty of some improper dealing with respect to it, and might, as it was alleged, have induced the jury to believe that the deed was either forged or fraudulently altered by *M'Cree*. The Lord Chief Baron however rejected the evidence. Witnesses were then called, who denied the genuineness of the defendant's and plaintiff's signatures. The jury, however, found a verdict for the plaintiff.

In *Michaelmas* Term, *Cresswell* obtained a rule nisi for a new trial, on the ground that the evidence rejected ought to have been admitted: citing *Wright v. Littler* (a), *Aveson v. Lord Kinnaird* (b), and 2 *Stark. Evid.* 263, (2nd edit.) The arguments were heard in *Hilary* and *Easter* Terms.

Alexander and *W. H. Watson* shewed cause.—The declarations of *M'Cree*, even assuming that they would have gone to the extent of proving a forgery of the deed, were inadmissible in evidence. The general rule as to the exclusion of hearsay evidence is correctly laid down by Mr. *Phillipps* (c):—"Hearsay is not admitted in our Courts of justice, as proof of the fact which is stated by a third person. This general rule (subject to certain exceptions hereafter to be mentioned) has been recognized and approved, from the earliest times, as a fundamental principle of the law of evidence, and is always to be

(a) 3 Burr. 1244; 1 W. Bla. 346.

(b) 6 East, 193.

(c) 1 Phill. Evid. 229 (7th edit.)

strictly observed. Some of our earliest writers lay it down as a proposition, acknowledged in our Courts, and not to be questioned, that matters of fact shall be tried by proof of witnesses, upon oath, before the judges. This implies, that the person on whose statement any fact is to be proved, must be sworn in the regular form, and speak to the fact from his own personal knowledge, in open court, at the time of trial." The same rule is stated, in corresponding terms, by Mr. *Starkie* (a). It is a rule to which exceptions have always been admitted with the greatest caution, and the Court will not be disposed to extend them. Then, does this case fall within any of the recognized exceptions to the general rule of law? They are stated by Mr. *Phillipps* to consist of the following classes:—*First*, dying declarations; *secondly*, hearsay in questions of pedigree; *thirdly*, hearsay in questions of public right, custom, boundary, &c.; *fourthly*, old leases, rent-rolls, surveys, &c., in certain cases; *fifthly*, declarations against interest; *sixthly*, rectors' and vicars' books; and lastly, tradesmen's books. [*Parke*, B.—The sixth are rather a class of the fourth.] It is submitted that the declarations tendered in this case fall within none of these classes. It is said that the case of *Wright v. Littler* affords an authority in support of their admissibility; but it is not so, when that case is carefully looked at. There, both the attesting witnesses to the will in dispute, under which the defendant claimed, being dead, their handwriting was proved in the ordinary form. The plaintiff then, in order to shew that the will was a forgery, called a sister of one of the attesting witnesses, who swore that while she was attending him during his last illness, and about three weeks before his death, he pulled out of his bosom a will of the same testator, of earlier date, and said it was the true will, and delivered it to her, that she might deliver it

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to the plaintiff; and, on cross-examination, she added that her brother acknowledged to her that the second will was forged by himself. No objection was made to this evidence at the trial, and the jury found that the will was a forgery. On motion for a new trial, the case was argued, and judgment given, on several grounds, any one of which, as was stated by Lord *Mansfield*, was sufficient to support the verdict; and with regard to the evidence as to the forgery, he says (a):—"It came out upon their own examination: they made no objection to it at the trial; and it certainly was a circumstance proper to the jury to consider." And he puts its admissibility mainly on the ground that it was a *dying* declaration—"an account given in the witness's last moments, when he could be under no temptation to say it, but to do justice and ease his conscience." He then proceeds to assign other reasons for refusing a new trial. According to the report of the same case in Sir *W. Blackstone* (b), Lord *Mansfield* expressly stated that no general rule could be drawn from the admission of the evidence in that particular case. At that period, dying declarations were held admissible and material on many questions, though they have since been restricted to the single case where the death of the party is itself the subject of inquiry(c). It is true that Lord *Ellenborough*, in *Aveson v. Lord Kinnaird*(d), and *Bayley, J.*, on *Doe v. Ridgway*(e), put the case of *Wright v. Littler* on the ground that, as the subscribing witness, if alive, must have been called as a witness, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery, the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence: and Lord *Ellenborough* refers to a *Nisi*

(a) 3 Burr. 1255.

53; *Rex v. Mead*, 2 B. & C. 605.

(b) 1 W. Bla. 349.

(d) 6 East, 195.

(c) *Doe v. Ridgway*, 4 B. & Ald.

(e) 4 B. & Ald. 55.

Prius case before Mr. Justice *Heath*, where he was himself permitted, on that ground, and on the authority of *Wright v. Littler*, to give in evidence that the attesting witness to a bond, in his dying moments, begged pardon of heaven for having been concerned in forging it. It is clear, however, that the reports of the case of *Wright v. Littler* furnish no ground for deducing from it so general a principle. Mr. *Starkie* adopts, in a note (a), the *dictum* of *Bayley, J.*, and says that, upon the same principle, evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose handwriting is proved to substantiate the instrument. No case, however, is to be found in the books in which such general evidence was given; although, when the character of the attesting witnesses has been impeached on the ground of fraud in the particular transaction, evidence is admitted to shew his general good character: *Doe d. Walker v. Stephenson* (b); *Bishop of Durham v. Beaumont* (c); *Provis v. Reed* (d). It cannot be pretended that these declarations stand in any degree on the same ground as the other cases in which hearsay is admissible,—entries against interest, or in old books, or in the course of business or the discharge of some duty imposed upon the party, &c. They have none of the ingredients which supply, in such cases, the stamp of authenticity, and dispense with the *voir dire* examination of the witness. It is urged that great inconvenience will ensue from the exclusion of such evidence; but the inconvenience of admitting it is much greater. Suppose, in this case, the witness *Potts* also had died before the trial, the same thing might have been proved as to him: whereas on the whole it was manifest that he did not distinctly deny his handwriting, and that in fact it was genuine. Again, if *M'Cree* had been alive, and called,

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(a) 2 Stark. Evid. 264.

(c) 1 Camp. 207.

(b) 3 Esp. 284; 4 Esp. 50.

(d) 5 Bingh. 435; 3 M. & P. 4.

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he might have refused to answer the questions tending to criminate himself. [*Parke, B.*—If he had, they might have proved his declarations, if relevant, by other evidence.] If they be admissible, they must be so equally in criminal as in civil cases. Suppose, on an indictment against *A.* for murder, the evidence went to shew that *A.* and *B.* were guilty, *B.* being dead: can it be contended that the declarations of *B.* that he committed the murder would be receivable in support of the case against *A.*? Evidence of *acts done* by the deceased witness is very different; they would be capable of explanation, but his declarations are not so. To admit them in such a case, will render the rights of property derived under solemn instruments most dangerously insecure.

Cresswell, Sir G. Lewin, and Addison, contra.—The arguments on the other side do not touch the real ground on which this evidence is admissible. The plaintiff is under the necessity of proving the *signature* of the deceased witness, which is no more than a *declaration* on his part that he saw the party execute the deed; that entitles the defendant to use other inconsistent declarations of the same witness, tending to shew that he did *not* see the party execute. It is said that the cases referred to in support of this motion proceeded on the ground that the declarations were made *in extremis*, and therefore under a sanction equivalent to that of an oath: but how does that reason meet the objection that the party is deprived of the opportunity of cross examination? If the plaintiff is permitted to prove declarations of *M'Cree* to sustain the deed, the defendant may use them also to impugn it. [*Lord Abinger, C. B.*—Is it not an assumption of yours that the signature is a *declaration*?—it is a *fact*. *Parke, B.*—Suppose it were a declaration not on the deed?] Then it would not be evidence. [*Parke, B.*—Then the evidence is confined to the deed itself—to the *fact* of attestation.]

If the signature does not amount to a declaration that the witness saw the party sign, it amounts to nothing. In *Wright v. Littler*, it is clear great injustice would have been done by the exclusion of the evidence. Nor was the declaration in that case a dying declaration, properly so called: for it does not appear that the party apprehended death at the time he made it. The admissibility of the evidence was distinctly put, in argument, upon the ground that it was given to discredit the evidence arising from the proof of the witness's handwriting; and that he must have been called if living, and would have overturned the will by giving the evidence of what his sister swore he owned to her. The same reasons apply to the present case. If *M'Cree* had been alive, and had been called, he clearly might have been cross-examined as to the facts to which his declarations referred. The case cited by Lord *Ellenborough*, in *Aveson v. Lord Kinnaird*, is strongly in favour of the defendant, and adds to the authority of Lord *Ellenborough* and *Bayley, J.*, that of Mr. Justice *Heath*, who distinctly recognised the principle of the admissibility of such evidence, as a substitution for the cross-examination of the party. In *The Bishop of Durham v. Beaumont (a)*, also, Lord *Ellenborough* says, referring to the case of *Doe d. Stephenson v. Walker*, which was there cited—"There the attesting witnesses whose character was disputed were dead, and it was properly held that the party claiming under the will should have the same advantage as if they had been alive. In that case they must have been personally adduced as witnesses, when their character would have appeared on their cross-examination; and being dead, justice required that an opportunity should be given to shew what credit was to be attached to their attestations of the will. In like manner the Court of *King's Bench* held, in the time

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of Lord *Mansfield*, that evidence of the conduct of deceased witnesses might be received, to attract credit to their testimony, *or to destroy its effect.*" And he then again refers to the case before *Heath, J.*, and says, "This confession only *supplied the place* of what might have been obtained from cross-examination, had the witness survived; and the propriety of admitting it was never questioned."—The question depends merely on what is the nature of the evidence given on the other side. That is not upon oath, but is permitted from the inconvenience which would ensue if it were excluded: and therefore the other party is at liberty to give opposite evidence of the same nature. Otherwise, the witnesses might all go abroad to avoid being examined, and yet the party impeaching their credit have no means of meeting the evidence of their mere handwriting.

Cur. ad. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action on a covenant in a mortgage deed, to which there was a plea of *non est factum*, tried before Lord *Abinger* at the last Summer Assizes for the county of *Durham*.

A man named *M'Cree*, who on the face of the instrument appeared to be the subscribing witness, being dead, the execution of the deed was proved in the usual way, by evidence of his handwriting, and the identity of the defendant was shewn by proof of his. Mr. *Cresswell*, for the defendant, offered in evidence declarations of *M'Cree*, of facts tending to prove that the deed was a forgery. Lord *Abinger* rejected them, and on a motion in the following term, a rule *nisi* for a new trial was granted, which has since been argued, and the Court (a) have taken time

(a) Lord *Abinger*, C. B., *Parke*, B., *Bolland*, B., and *Gurney*, B.

to consider the question, which, like all others relating to the rules of evidence, is important. We who heard the argument, are all of opinion that the evidence was properly rejected.

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The general rule is, that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence; but certain exceptions have also been recognised, some from very early times, upon the ground of necessity or convenience. The simple question for us to decide is, whether such a declaration as this be one of the allowed exceptions to the general rule.

As the plaintiff, upon its appearing that the supposed subscribing witness was dead, was at liberty to give secondary evidence of the execution of the deed, and for that purpose proved the handwriting of that witness in the attestation (which raises a presumption of the due execution, otherwise the name could not have been placed there), there can be no doubt but that the defendant might also on his part give evidence to rebut that presumption by the proof of any material *fact*, tending to shew that the deed was not so executed: such, for instance, as the absence of the alleged attesting witness from the place where the deed was stated to have been signed at the time. But the question is, whether he is to be permitted to rebut this presumption, not by evidence of *facts*, proved in the ordinary way, but proved by *declarations* of the subscribing witness? Is evidence of what the subscribing witness *has said* admissible?

It was contended on the argument that it was, and that it formed an exception to the general rule, and on two grounds; one of them, which I shall mention first, in order to dispose of it, was, that, as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use

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any declaration of the same witness to disprove it. The answer to this argument is, that evidence of the handwriting in the attestation is not used as a declaration by the witness, but to shew the fact that he put his name in that place and manner, in which in the ordinary course of business he would have done, if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is, therefore, not the proof of a declaration, but of a fact.

The other ground, and the principal one, on which the most reliance was placed, was, that it was in the nature of a substitute for the loss of the benefit of the cross-examination of the subscribing witness, if he had been alive and personally examined; by which, either the fact confessed would have been proved; or, if not, the witness would have been liable to be contradicted by proof of his admission: and it was contended that every declaration was admissible which might have been given in evidence to impeach the credit of the witness himself on his personal examination.

Let us inquire what the authorities are in support of this exception. If we should find them numerous, and of long standing, we should be bound to give effect to them, though we might doubt the policy of introducing such a departure from the established rule: if we find them few, and of comparatively recent origin, and not supported by the deliberate judgment of any Court, we ought not to sanction the introduction of such an exception, especially if its convenience and practical utility be of a doubtful nature.

The first case referred to is that of *Wright v. Littler*, in which it appeared that a witness for the plaintiff, on his cross-examination *by the defendant's counsel*, stated that the subscribing witness to an instrument, the validity of which

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as a will formed a part of the defendant's case, acknowledged in his last illness, on producing as a true document a prior will which he had in his custody, that the instrument in question was forged by himself. No objection was taken to the evidence at the trial. On a motion for a new trial, the whole case was fully discussed, and the application was refused on several grounds; amongst others, the admissibility of this evidence was considered; and Lord *Mansfield*, according to the report in *Burrow*, in answer to the objection that this evidence was improperly received, says, "it came out upon their *own examination*, they made *no objection to it* at the trial, and it certainly was a circumstance proper for the jury to consider." And after alluding to the other facts, he says—"that the account given in the last moments of the subscribing witness was proper, even though it had been upon an examination of the plaintiff; and as the account was a confession of a great enormity, and as he could be under no temptation to say it, but to do justice and ease his conscience, he was of opinion that it was proper to be left to the jury; but, independently of that declaration, he thought fraud and forgery were apparent."

From this report it is clear, that Lord *Mansfield* by no means lays it down distinctly as an established rule of evidence, that such a declaration, even when made *in extremis*, is admissible. If it had been in his opinion a rule of law, that such statements were evidence, it is not likely that he would have assigned so many other reasons for refusing a new trial: and if we look at the report of the same case in Sir *William Blackstone's Reports*, that impression is confirmed; for his lordship is stated to have declared distinctly, that *no general rule could be drawn from it*, and that unless manifest injustice had been done in the whole case, there was no ground for a new trial. On the authority of this case, Mr. Justice *Heath*, at *Nisi Prius*, admitted evidence that the attesting witness in his

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dying moments begged pardon of Heaven for having been concerned in forging the bond or will: and Lord *Ellenborough*, who states that decision, and apparently with approbation, twice, in 6 *East*, 195, and 1 *Camp.* 211, says that it was admitted on the ground, that as the subscribing witness might have been cross-examined as to the fact, his declaration of the fact might have been proved, in contradiction to the presumption of a due execution of the bond from the proof of the handwriting of the subscribing witness; and he also adds, that the propriety of the reception of the evidence was not questioned.

This ruling of Mr. Justice *Heath* was also referred to by Mr. Justice *Bayley* in *Doe v. Ridgway*, where he says “that the case of the subscribing witness *seems to be* founded on the principle, that the defendant ought not to be deprived of the advantage of such evidence of contradiction by the death of the witness.”

Such is the state of the authorities on this subject, which are very limited indeed in point of number: and when it is considered in how qualified a manner the opinion of Lord *Mansfield*, the origin and foundation of the others, is expressed; and when it is recollected that both then and at the time of the *Nisi Prius* trial before Mr. Justice *Heath*, an opinion prevailed (which is now properly exploded), that *any* declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath, which consideration *certainly* had an influence on the mind of Lord *Mansfield* at least, it is impossible to say that there is any such weight of authority, however great our respect for the eminent Judges whose names have been mentioned, as to induce us to hold that this case is established and recognised as an exception from the great principle of our law of evidence, that facts, the truth of which depends on parol evidence, are to be proved by testimony on oath.

If we had to determine the question of the propriety of

admitting the proposed evidence, on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that it was at the least very doubtful, whether, generally speaking, it would not cause greater mischief than advantage in the investigation of truth. An extreme case might occur, as there seems to have done before Mr. Justice *Heath*, where the exclusion of evidence of a death-bed declaration would probably have been the exclusion of one mode of discovering the truth. The same may, perhaps, be said of all solemn assertions *in extremis* by deceased witnesses. But, on the other hand, if any declarations at any time from the mouth of subscribing witnesses who are dead are to be admitted in evidence, (and you cannot stop short of that, for no one contends that the exception is to be *confined* to death-bed declarations, and if so confined, the evidence would be inadmissible in the present case), the result would be, that the security of solemn instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods, by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting, or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination. We cannot help feeling, therefore, that it is at least very doubtful whether the establishment of such an exception would be productive of any advantage: and when the great benefit to the administration of justice, of abiding by general rules and acting upon general principles, is taken into consideration, we feel no doubt but that it would be inexpedient to sanction this additional exception to the establish-

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ed rule of evidence. We therefore think the rule for a new trial must be discharged.

Rule discharged.

BALLINGER v. FERRIS.

A constable who takes a party into custody, *bond fide* believing that he has committed an offence against the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, is entitled, under the 41st section, to notice of action, although he did not see the alleged trespass committed, and there is no proof of any complaint made to him by the owner of the property injured.

TRESPASS for assaulting and imprisoning the plaintiff, and detaining him in custody until he delivered up a certain horse, (and in another count, until he paid the sum of 3s.), in order to procure his discharge. Plea, not guilty. At the trial, before *Williams, J.*, at the last *Monmouth* Assizes, the facts appeared to be as follows. The plaintiff, who was a waggoner, was driving a timber waggon, on the 3rd of *August*, 1835, out of the street at *Chepstow* into the dock-yard there, and, either by negligence or inadvertence, overturned a donkey-cart which stood in the street, close to the wall, and injured both the cart and the ass. Some persons who stood by laid hold of the plaintiff to detain him, and about ten minutes afterwards the defendant, who was a police constable appointed for the town of *Chepstow* under a local act of Parliament, took him into custody, and he was taken to a lock-up house, and detained there about an hour, until he gave up one of the horses of his team as a security for the satisfaction of the damage done. The plaintiff afterwards attended before a magistrate, when he was ordered to pay the sum of 2l. for the damage; and that sum being paid, the horse was restored to him. For the defendant it was contended, that he was entitled, under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 41, to notice of action; and *Beechey v. Sides* (a) was relied on. The learned Judge was of opinion that notice was not necessary, inasmuch as the defendant did not see the alleged trespass committed, and

(a) 9 B. & C. 806; 4 Man. & R. 634.

there was no proof of any complaint made to him by the owner of the cart; and he stated to the jury that the defendant was not justified in imprisoning the plaintiff, and left it to them to say to what damages the plaintiff was entitled: but reserved leave to the defendant to move to enter a nonsuit. The jury found for the plaintiff, damages one farthing.

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In *Easter Term, Ludlow, Serjt.*, having obtained a rule *nisi* for a nonsuit, pursuant to the leave reserved,

Greaves now shewed cause.—The defendant was not entitled to notice of action. This arrest was altogether illegal in the first instance. The 7 & 8 *Geo. 4*, c. 30, s. 28, allows the apprehension of the party without a warrant only where he is *found committing* any offence against the act; and for the purpose of forthwith taking him before some neighbouring justice. Now here, assuming the act to have been wilful, not only did not the policeman find the plaintiff in the commission of it, but there was no proof of any information given to him by the party aggrieved. In *Rex v. Curran (a)*, which was a decision on the Larceny Act, 7 & 8 *Geo. 4*, c. 29, s. 63, where the same words are used, it was held, that if the party apprehending did not see the offender in the actual commission of the offence, or was taking him to any other place than before a magistrate, his killing such party would not be murder. And as the first arrest was illegal, all the subsequent detention was so too; and also because it was not for the purpose of taking the plaintiff forthwith before a justice. But there was no *wilful and malicious* act done which justified any interference at all. [*Alderson, B.*—In *Beechey v. Sides*, (which was a decision on this act), Lord *Tenterden* says—“It has uniformly been held, that where a party *bonâ fide* believes or supposes he is acting in pursuance of an act of Parliament, he is within the protection of such a clause.”]

(a) 3 C. & P. 397.

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In that case the defendant was the owner of the premises, saw the plaintiff committing the act, and gave an express charge to the constable. The true distinction is not whether the party is acting *bonâ fide*—for he may act *bonâ fide*, and yet not be entitled to notice—but there must be some one act done which was within the scope of his jurisdiction or authority, and which he was entitled to do. The protection does not apply where the party is altogether a wrong-doer, but where, acting generally within his authority, he may have varied from it in some respects. If not, this defendant would be equally entitled to notice whether the arrest were an hour or a day afterwards. [*Alderson, B.*—In *Beechey v. Sides*, no part of the act done was within the authority; but the judgment proceeded on the ground that the defendant *bonâ fide* believed that he was acting under the authority of the act.] But here, there was no information given by any party who saw the injury done. In *Cook v. Leonard (a)*, *Bayley, J.*, says—“If an officer does any act, part of which is, and part of which is not, authorized by the statute, the mere excess of authority does not deprive the officer of that protection which is conferred upon those who act in execution of it; but where there is a total absence of authority to do any part of that which has been done, the party is not entitled to that protection.” That case is a strong authority in favour of the plaintiff. Where a constable acted without a warrant, and not on his own view, he was held not to be entitled to the protection of the 24 Geo. 2, c. 44, s. 8: *Postlethwaite v. Gibson (b)*, *Parton v. Williams (c)*. [*Lord Abinger, C. B.*—No doubt of that; all turns on the words of the 7 & 8 Geo. 4. *Alderson, B.*—Surely the constable must be entitled to notice when he is in the wrong; when he is in the right he does not need it.] But not when he is *totally* in the wrong.

(a) 6 B. & C. 351; 9 D. & R.
339.

(b) 3 Esp. 226.

(c) 3 B. & Ald. 330.

Ludlow, Serjt., (*Whateley* with him), *contrà*.—It may be admitted that the defendant acted illegally ; the only question is, whether he did not so act under circumstances which gave him a reasonable ground for believing that he was acting *bond fide* in pursuance of the statute ; which is the criterion laid down by Lord *Tenterden* in *Beechey v. Sides*. But the learned judge ruled without qualification that the defendant acted illegally, and left to the jury only the question of damages. There can be no doubt that the injury committed by the plaintiff was wilful and malicious within the meaning of the statute. [He was then stopped by the Court.]

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Lord ABINGER, C. B.—The Court are all of opinion that the rule should be absolute. It may be taken that the officer acted illegally ; but the question is, whether he acted in pursuance of a supposed authority given by the act of parliament. To enter into very nice distinctions, for the purpose of shewing that the act was quite precisely within the scope of the authority, would be very invidious, and very disastrous to public officers. In this case it is clear that the officer must have been close by when the act was done ; whether he was within sight or not does not appear : then some sort of statement having been made to him by some person who saw the act done, he takes the plaintiff into custody, and detains him for a short time, until, a horse being delivered up as a security for satisfaction of the damage, he is discharged from custody. It is questionable whether the injury arose from negligence, and it might not therefore be within the act ; the by-standers, however, evidently thought it was malicious, for they laid hold of the plaintiff to detain him in consequence. Then it seems, although the defendant might be mistaken, that he meant to act under the act of parliament ; and the very moderate damages given by the jury show their opinion that he acted *bond fide*. We should take away the pro-

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tection given by the statute, if we were to say that where there is a doubt as to the authority of the party, but none as to his motives, he should not have the opportunity which the legislature designed to give him, of tendering amends. The very purpose for which the act gives him that opportunity supposes him unable to justify the facts; he requires notice that he may tender amends. We think it is clear that the defendant acted under the supposed authority of the statute.

BOLLAND, B., concurred.

ALDERSON, B.—It is clear also that under s. 41 of the same act, the plaintiff would not have any costs, because there is no certificate of the Judge's approbation.

GURNEY, B., concurred.

Rule absolute.

NORTON'S Bail.

It is not necessary to state in a notice of justification of bail, whether the bail intend to justify in person or by affidavit.

IN this case, *J. Jervis* objected to the justification of town bail, on the ground that the notice of bail did not state whether the bail would justify in person or by affidavit. But the Court over-ruled the objection, and the bail justified. He then applied to the Court that the costs of justification might not be allowed, on the above ground.

PER CURIAM.—That is no ground of exemption. The bail have justified as to the property mentioned in this notice.

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WIGHTMAN moved for judgment against the casual ejector, on an affidavit stating that the copy of the declaration had been delivered to a servant of the tenant in possession, who was left in care of the premises. [Lord *Abinger*, C. B.—That is not enough; the tenant may have had no notice of it.] Perhaps the Court will grant a rule to shew cause, and if the tenant has had no notice, he may state that by affidavit.

An affidavit, stating that a copy of the declaration in ejectment had been delivered to a servant of the tenant in possession, who was left in care of the premises, is insufficient to move for judgment against the casual ejector, and the Court will not even grant a rule to shew cause on such an affidavit.

Lord *ABINGER*, C. B.—The tenant may shew cause, and say that your affidavit does not shew that he has had any notice of it. You must go further, and shew that the servant has authority to receive papers and letters for the tenant.

Rule refused.

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TRESPASS for taking and detaining a boat or vessel of the plaintiff, called a flat.

The plea set out at length an indenture dated 19th *April*, 1830, being a grant by one *W. Furnival* of several annuities issuing out of certain salt works, situate at *Wharton*, in the county of *Chester*, to *F. Kemble* and *F. Lock*, as trustees for the several annuitants; and stated that the boat or vessel of the plaintiff in the declaration mentioned, being in a certain cut or canal, part of the premises in the said indenture mentioned, upon which the several annuities were charged or chargeable, and out of which they were yearly

Salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation. The boat of the plaintiff, an alkali manufacturer, was

lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture:—*Held*, (*Parke*, B., *dissentiente*), that she was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt.

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issuing and payable, the defendant, at the said time when &c., as the servant and bailiff of the said *F. Kemble* and *F. Lock*, and by their command, seized and took the said boat or vessel, so then being and lying in the said cut or canal, &c., as and for a distress for the arrears of the said annuities, &c. &c.

Replication, that before any of the said times when &c., the plaintiff was, and thence hitherto hath been and still is, a manufacturer and trader and dealer in certain alkalies, to wit, a certain alkali called black ash, and a certain other alkali called white ash, and during all the time aforesaid has exercised and carried on such manufacture, trade, and dealing as aforesaid, to wit, at certain premises of him the plaintiff in the county of *Lancaster*; and during all the time aforesaid, he the plaintiff hath from time to time made and manufactured divers great quantities of such alkalies, and dealt in and sold the same as aforesaid, which said manufacture, trade, and dealing, was a useful manufacture, &c., and of great benefit: and the plaintiff further says, that for the purpose of such manufacturing and making such alkalies as aforesaid, great quantities of salt are required, which are used in the making and manufacturing such alkali as aforesaid; and that during all the time aforesaid, the plaintiff had occasion for and required great quantities of salt for such purposes aforesaid; and that the plaintiff, for a long time before any of the times when &c., was used and accustomed from time to time to use and employ the said boat or vessel in the declaration mentioned, for the purpose of and in bringing, fetching, and carrying divers great quantities of salt to the plaintiff's premises, to be used by him in such manufacture as aforesaid, from the salt works hereinafter mentioned, which said salt was, during all that time, from time to time received in and by such boat in the said cut or canal, at the place in which she was so seized and taken as aforesaid, and thence was carried in and by the said boat down the

said cut or canal into a certain river or navigation, and thence by certain other rivers and navigations to the plaintiff's said premises: and the plaintiff further says, that long before the said *F. Kemble* and *F. Lock*, or either of them, had anything or any interest or rent in or out of the said premises in the plea mentioned, or any of them, and before the making of the said indenture of &c., to wit, on the 1st of *April*, 1830, the said *W. Furnival*, being so as aforesaid interested in and possessed of the said premises in the plea in that behalf mentioned, made and erected certain salt works, to wit, the said works, in and upon the said premises in the plea mentioned, and near and close to the said place where the said boat was so seized as aforesaid; and the said *W. F.*, to wit, then, for the purpose of enabling the subjects (a) of this realm who should have occasion to purchase salt at the said salt works, to fetch the same therefrom, and to receive the same there, and to carry the same away in boats, and for the purpose of enabling the tenants and occupiers of the said premises and salt works to have the charge and loading of such boats, did make, dig, and cut the said cut or canal in the plea mentioned, near and close and up to the said salt works, and which said cut and canal communicated with a certain river or navigation, being a public high road: and the said *W. F.*, and the tenants and occupiers of the said premises and salt works, always since the erection of the said salt works, and the digging and making the said cut or canal, from time to time made and manufactured salt there, to wit, on the premises in the plea mentioned, and sold and disposed of the same there as an article of trade and merchandize, and delivered and supplied such salt so made

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(a) On the hearing of the argument, it was suggested by the Court that it did not appear with sufficient certainty from these words, that the manufacture and sale of the salt was a public trade;

and by consent, the replication was amended, by reading "*all* the subjects of this realm, &c.;" and in a subsequent paragraph, "*all* persons, &c."

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to [all] persons desirous of buying and taking away the same in boats, at the said place in the said cut or canal where the said boat was when she was so seized as aforesaid, and such persons have always during the time last aforesaid taken away the same in their said boats along the said cut or canal: and the plaintiff further says, that shortly before the said time when &c. in the declaration mentioned, having occasion for salt for the purposes of his said manufacture, he did, in order to get salt for the purposes aforesaid, send and take his said boat or vessel into the said cut or canal to the said salt works, to a part of the said cut or canal, being the place where salt so made on such premises as aforesaid was at that time usually sold and delivered by the tenants and occupiers of the said salt works and premises to persons buying salt, and fetching and taking away the same in boats from the said salt works: and the plaintiff says, that at the time of the seizing and taking and carrying away the said boat as in the said declaration mentioned, the said boat was in the said cut or canal for a temporary purpose only, and for the benefit of trade and manufacture, to wit, for the purpose of obtaining, receiving, and taking the salt from the said salt works, and the tenants and occupiers thereof as aforesaid, to be carried to the said manufactory and premises of the plaintiff, and there to be used in the said manufacture as aforesaid, and for the purposes of the plaintiff's trade and manufacture as aforesaid; and that the said boat had not then been or remained there, or upon any of the premises in the plea mentioned, for any long or unreasonable time in that behalf, for that purpose, or for any other purpose; and the plaintiff during all the time aforesaid was a stranger, and not privy to any of the parties or persons in the plea mentioned, or any or either of them, in estate or otherwise, and had not, during any of the times aforesaid, any notice or knowledge of the said deeds, rent-charges, or arrears of rents, or of any of them; and the said boat

or vessel being in the said cut or canal for such temporary purpose as aforesaid, and for the benefit of trade and manufacture as aforesaid, the defendant, at the said time when &c., wrongfully committed the said trespasses, &c. Verification.

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General demurrer and joinder. The point stated for argument in the margin on behalf of the defendant was, that, under the circumstances disclosed in the replication, the boat was not privileged from distress.

The case was argued in *Easter Term*, by

W. H. Watson, in support of the demurrer.—The plaintiff's boat was not under the circumstances privileged from distress. All the cases in which such privilege has been allowed, stand on the ground of public convenience. The principle is thus stated by *Dallas*, C. J., in *Gilman v. Elton* (a): "On the principle of public convenience, a rule has been adopted in favour of trade and commerce; and as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favour of trade and commerce. The exception has been clearly laid down:— 'Goods delivered to any person exercising a *public* trade or employment, to be *carried, wrought, or managed* in the way of his trade or employ, are, for that time, under a legal protection, and privileged from distress for rent (b).'" Now, the present is merely the case of a party sending his boat for goods for his own private and individual convenience: it is not sent to be carried, wrought, or managed. [*Alderson*, B.—So, where a horse is sent to a smith's shop to be shod, it is for the private convenience of the party sending]. But the horse must be sent there for that purpose; and the trade of a farrier is a publicly recognised trade; he had a lien at common law; and that will be found to

(a) 3 Brod. & B. 80 ; 6 Moore, 243.

(b) *Gisbourn v. Hurst*, Salk. 250.

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have been the case in all the instances where the privilege has been allowed, when they come to be examined. The right of lien in the tradesman, and the privilege of the goods from distress, are almost in effect convertible terms. In *Gisbourn v. Hurst*, the privilege is stated to belong to goods *delivered* to any person exercising a public trade, to be carried, wrought, or managed, &c. Here the boat was not delivered to any person at all, but remained in the control of the plaintiff by his servant. In that case, goods delivered to a carrier were held privileged, on the express ground that his is a *public* trade. On the same ground, goods landed at a wharf, and deposited there till an opportunity for sale occurred, were held privileged from distress for rent due for the wharf. *Thompson v. Mashiter* (a). [*Parke, B.*—A horse going to a public market is not delivered to be carried, wrought, or managed: yet he is protected.(b). Lord *Abinger, C. B.*—The question in all these cases appears to be, whether the trade is so carried on as that the goods of other persons are necessarily to be seen on the premises—whether it be a trade which consists in receiving the goods of other persons]. In *Rede v. Burley* (c), where wool was put by a clothier to a spinner to spin, and the clothier came with a horse to carry away the yarn, and because the spinner had no beam or weights to weigh it, the clothier and spinner, by leave of a neighbour, who had a beam and weights in his house, brought the horse thither, and entered to weigh the yarn, and while they were there, the landlord of the house distrained the horse and the yarn for his services—it was held that they were not distrainable; but that also was on the ground that the trade of a clothier is *pro bono publico*, and the weighing a necessary part of the trade.

(a) 8 Moore, 260; 1 Bing. 260; 2 Vent. 50; 2 Lutw. 116l. 283.

(c) Cro. Eliz. 549, 596; Noy's

(b) *Fowkes v. Joyce*, 3 Lev. Rep. 68.

So, in *Adams v. Grane* (a), goods sent to an auctioneer for sale were held privileged; for he is only a factor of a peculiar kind, and his also is a public recognised trade. The case of *Fowkes v. Joyce*, which extended the exemption to cattle in their way to market, has been questioned; and there relief was given in equity, on the ground of fraud. *Wood v. Clarke* (b) is another authority in favour of the defendant; because there, *machinery* delivered to a weaver to be used in his house for the manufacture of materials also delivered to him, was held not to be protected. So the boat here was only the machine by which the goods were to be conveyed; and it was not in use at the time of the seizure. It is not necessary that such vehicles should wait on the premises of the tradesman.

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Crompton, contrâ.—The greatest inconvenience and injury must result to trade, if the protection is not to be allowed in such a case as this: and the argument *ab inconvenienti*, in general the weakest, is here the strongest argument that can be applied; because the privilege exists only on the ground of the convenience of trade. It is said that it is not necessary for vehicles of this kind to wait upon the premises subject to the rent charge; but how otherwise are they to carry home the produce of the manufacture? At extensive works, such as salt-works, it must continually happen that they must wait for their turn to be loaded. So at coal-works, a number of carts are continually to be seen waiting to be loaded, the horses being put by for the time. So at a wharf—and it may be fairly said that this is a wharf within the meaning of the rule—the vessels must wait to receive their cargo in their turn. Nothing can be more inconvenient, or more prejudicial to trade, than that a boat, lying to be loaded in one of the private cuts which occur so frequently on all navi-

(a) 1 C. & M. 380.

(b) 1 C. & J. 484.

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gable canals, shall be held distrainable for a rent-charge which may have been in arrear for years. A vehicle for fetching or carrying the produce of a manufacture is altogether different from an implement of trade. It is necessary, or at least highly convenient, that the produce should be carried home in the vehicle of the buyer. [*Alderson*, B.—You do not aver that it was necessary that the barge should come into the possession of the manufacturer]. It was on his premises by authority of law, for the general convenience of trade; that is enough. It is only that the purchaser of the article is his own carrier. The rule laid down by *Blackstone* (a), *Lord Coke* (b), &c., that “valuable things shall not be distrained for rent, for benefit and maintenance of trade, which, by consequent, are for the common wealth, and are there *by authority of law*”—does not mean that they must be on the premises of a trader *compellable by law* to take them in; the words “by authority of law” are used only by way of contradistinction from an *authority in fact*; and have reference merely to the keeping of an open place, to which all persons *may* come in the course and for the purposes of trade: not describing a *legal compulsion*, but a *legal licence* to be there; such as would amount to an excuse for a trespass. And the instances there given of the rule—of a horse in a smith’s shop or in a hostry, cloth in the weaver’s or tailor’s shop, &c., are stated merely as illustrations of it. If this construction be correct, the goods may be said to be there by authority of law, if for the purposes of trade, however private the contract may have been. *Brown v. Shevill* (c) is strongly in favour of this view of the case. There, a carcass in the shop of a butcher, to whom the beast had been sent to be slaughtered, was held protected from distress: and *Patteson*, J., says—“Then a question is made, whether the trade of a

(a) 3 Comm. 8.

(b) Co. Litt. 47. a.

(c) 2 Adol. & Ellis, 138; 4 Nev. & M. 277.

butcher be a public one. What is meant by public I do not understand. A common carrier and an innkeeper are bound to take in goods sent to them for the purposes of their trade. If that be the distinction pointed at, I can understand it. But a tailor is not obliged to take in cloth to be cut by him (a); so that I do not see how we can make such a distinction available for the purposes of the present question." [Alderson, B.—A factor, also, is not compellable to receive goods]. *Rede v. Burley* is the case always referred to as giving the widest construction of the rule in favour of trade. As commerce advanced, it was found absolutely necessary to relax the strictness of the old feudal rules as to distresses, in its favour; and that case goes the whole length to which the present plaintiff seeks to carry the rule. It was not averred there that it was necessary for the purposes of trade that the horse or yarn should be on the premises out of which the rent issued. *Walmsley, J.*, who differed from the other Judges, dissented on the ground that it was not a *common beam*, or place for weighing, but that the horse was in the house of a mere private person; but he agreed, that an inn, or a mill, or a farrier's shop, was such common place as would have given the protection; that is, any place where the party had a *right* to go by the tacit permission of the law. But the doctrine of the other Judges goes the full length of comprehending the present case. The goods were not distrained for rent of the premises where they were delivered; and not merely the goods, but the vehicle also which went to fetch them was protected; and *that* as against the distress of a landlord having nothing to do with the premises where the trade was carried on. The protection was allowed, merely because the Court saw on the face of the plea that it was necessary for the con-

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(a) It appears to have been anciently considered otherwise; see the cases cited in argument in

Francis v. Wyatt, 3 Burr. 1499, and in *Adams v. Grane*, 1 C. & M. 384.

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venience of trade that it should be so: "the cause of the bringing privilege them." And one of the Judges, *Owen, J.*, held them protected on the additional ground that they always were in the possession of him who brought them. The decision in *Wood v. Clarke* proceeded on the ground of the interest a workman has in his tools of trade: that is altogether different from the privilege of the owner of goods sent to be manufactured. The main ground of the decision in *Francis v. Wyatt (a)*, where a carriage standing at a livery-stable keeper's was held not to be privileged, was, that it was there for a permanency, not for a temporary purpose; that case is no distinct authority that the trade must be of a public nature. In *Gilman v. Elton (b)*, *Park, J.*, says, "the case in *Cro. Eliz. (c)* is strong to shew that it is the trade which is favoured, not the individual." *Thompson v. Mashiter* is also strongly in favour of the plaintiff; for this is in effect a wharf—a place where goods are discharged and loaded on the banks of a canal or cut. In *Adams v. Grane*, again, *Bayley, B.*, puts the privilege on the broad ground that it is for the convenience and benefit of trade in general. It cannot be conceived that any landlord would give credit to his tenant on the presumption that boats waiting to be loaded with his manufacture were his own. The plaintiff was on these premises for a temporary purpose, connected with and for the benefit of trade, under the authority of law, as properly construed, and under circumstances in which no presumption could arise that the property was the occupier's. The rule ought not to be limited to the particular instances which have actually been decided upon, many of which occurred in a comparatively rude state of society, and were in fact cases of much less inconvenience and detriment to commerce than such as the present.

But it may perhaps be questionable, whether the goods of

(a) 3 Burr. 1498; 1 Black. 483.

(b) 3 Brod. & B. 83.

(c) *Rede v. Burley*.

the plaintiff, a stranger, were distrainable at all for this rent charge. The doctrine laid down in *Com. Dig.*, Distress, B. 2, that the goods of a stranger can in no case be distrained for a rent charge, was certainly overruled in *Saffery v. Elgood* (a); but it may be doubtful whether that authority applies to a case where, as here, the goods are on the premises by the permission and invitation of the party himself by whom the rent charge was granted.

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Watson, in reply.—No case can be found where the privilege was admitted under such circumstances as the present. If the party abandons the actual possession of his vehicle, he abandons his privilege of exemption from distress. It is not shewn that there was any necessity to leave this boat, or that the usage and convenience of trade required it. Even in a shop, if a party chose to come and leave his vehicle there, it would be distrainable. *Brown v. Shevill* is in truth strongly in favour of the defendant; it was the butcher's business there to slaughter the beasts sent to him. The *authority of law*, as used in the old cases, meant *compulsion of law*—having reference to the same cases to which the right of lien was then supposed to be confined. *Rede v. Burley* seems to have proceeded on the ground that the goods were in the manual possession of the party bringing them; and the horse was protected, as being an accessory to the goods. The case of beasts going to a public market is the only case in which the privilege has been allowed, where a lien does not exist:—the auctioneer has a lien for lotting and cataloguing the goods; the factor for advances: the party in *Rede v. Burley* had a lien for the weighing. And that excepted case is put on the ground of the common law regard

(a) 1 Ad. & Ell. 191; 3 Nev. & M. 346.

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for markets and fairs, and therefore stands clear of the other authorities relating to the delivery of goods to tradesmen. And the law acknowledges no distinction as to the *permission* or *invitation* of the occupier; the goods are equally distrainable whether they are there wrongfully or with his permission. As to the other point suggested, the case is clearly within the authority of *Saffery v. Elgood*; there being no suggestion of title paramount.

Cur. adv. vult.

The Court being divided in opinion, in the present term the Judges delivered their opinions *seriatim*.

ALDERSON, B.—The question raised upon the demurrer to the replication in this case is, whether the boat, stated to have been distrained for rent by the defendant, was by law distrainable under the circumstances disclosed in these pleadings. [His Lordship stated the replication].

The leading case on this subject is that of *Simpson v. Hartopp (a)*, in which Lord C. J. *Willes*, in delivering the judgment of the Court, goes very fully into the law on this point. He lays it down, that there are five sorts of things which at common law were not distrainable:

1st. Things annexed to the freehold.

2nd. Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or employ.

3rd. Cocks or sheaves of corn.

4th. Beasts of the plough and implements of husbandry.

5th. Instruments of a man's trade or profession.

The three first classes are absolutely free and exempt at common law, and the latter *sub modo*, in case there be no sufficient distress without them. There are however other

(a) *Willes' Rep.* 512.

exemptions not here enumerated: first, chattels in actual use, or in the actual possession and presence of the owner himself, an exemption intended to prevent a breach of the peace; and secondly, the instruments or vehicles of conveyance of goods privileged from distress, or brought to a public market or fair, there to be sold.

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Now, of the exemptions enumerated by Lord C. J. *Willes*, it is plain that only the second can be at all applicable to this case. We must first inquire, therefore, whether this boat is within that rule.

It is a chattel brought by the plaintiff to a place, where, according to the pleadings, a public trade in salt is carried on, and is there left for the temporary purpose of being loaded with that article; whilst it remains in that state, and before a reasonable time for so loading it has elapsed, it is distrained for rent due to the landlord of the premises wherein the trade in salt is carried on. Such are the facts of the case.

The boat is clearly not within the description of goods delivered to a trader to be *carried* or *wrought*, (*i. e.* worked up into another form), in the way of his trade or employ; for there is nothing to be done to it; it is not brought to be repaired or altered in any way.

Then, is it delivered to be *managed* in the way of the trade or employ of the person to whom it is so delivered?

In *Simpson v. Hartopp*, the word “managed” appears to be used as synonymous with “manufactured.” But that is too limited a sense of the expression: for the Courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be, that where, in order to the exercising such a

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public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered.

This is the reason assigned in *Simpson v. Hartopp*, and in *Wood v. Clarke*. The principal ground which Lord *Lyndhurst* assigned why the loom was not privileged, was, that it was not necessary for the protection of trade that such privilege there should exist. Here, also, it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling the salt. The trade may well be carried on at these salt works without the possession of the boat being parted with at all by the owner. If he retains possession of it, there is no doubt that it is privileged; but then it is for a totally different reason, viz. that the taking it would lead to a breach of the peace, and then the case falls within another exemption before pointed out. The instances found in the books, of the horse in the smith's shop; of the cloth sent to the tailor; of the materials sent to the weaver; of the goods sent to the factor; of the beast sent to the carcass butcher; are all cases of chattels delivered to be dealt with by the third person in the way of his trade, under circumstances in which his trade cannot be carried on at that place unless the goods are so delivered.

It is however proper to advert to the last of the two exemptions before pointed out, in addition to those mentioned by Lord C. J. *Willes*. That exemption is, where the thing distrained is the instrument of conveyance of goods which are themselves privileged, or which are brought to a public fair or market. And this is another instance of the same principle, viz. a protection for the benefit and convenience of trade. The article must be con-

veyed, and it is privileged from distress; therefore, all things necessary for that purpose are privileged also. Thus, the horse or carriage conveying goods is so privileged; and so also the basket or package in which they are enveloped, and the like. So, again, cattle going to, or at, a fair or market are privileged; and, as a consequence arising out of the necessity for their refreshment on their passage towards such fair or market, if distant, they have been held to be privileged during any temporary agistment on the road (a). But these are all instances of a privilege arising as accessory to another privilege. And although we are not prepared to draw any distinction between the instrument of conveyance to, or that from, the place where the privileged goods to be thereby carried, are situate, yet we think that the privilege is not to be extended to the conveyance sent for goods, which are not themselves privileged from distress. Now here it is abundantly clear, that the salt which was to be conveyed by this boat was not itself privileged from the distress. For it was the property of *Furnival* himself, and was therefore, as his property, clearly liable to be distrained for the rent due from him to his landlord. Nor can this case fall within the rule exempting the horse or carriage conveying, or which has conveyed, goods to a fair or market. There the privilege arises out of the advantage derived to the public from the proper supply to that public place of resort and traffic. In *Fowkes v. Joyce* (b), it was held that cattle in their progress towards London were privileged; but the Court appear to have proceeded on the ground, that there was no solid distinction between the supply of a great city, and the supply of a fair or market. But I am not aware that a shop carried on for the private profit of an individual, or that a horse bringing *home* goods from a fair or market, for the individual profit of the purchaser,

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(a) 2 Saund. 290 a, note 7.

(a) 3 Levinz, 260.

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has ever been held to be within this rule: nor can they, as I think, fairly be considered within the principles on which the rule appears to be founded.

I do not think we can or ought to decide this case upon what may appear to be expedient. If we adopt such principles of decision, we shall deprive the law of one great advantage, viz. certainty; for that which appears expedient to one, may be in the opinion of others very inexpedient. If this argument were well founded, it would have undoubtedly prevailed in the case of the livery stable keeper. *Francis v. Wyatt*. But the Court there adhered, against their own views of expediency, to the ancient decisions; and subsequent experience has shewn that the so much dreaded consequences did not afterwards arise in practice.

Upon the whole, therefore, this case seems to me not to fall within any decided authority, nor within any of the principles upon which goods have hitherto been held privileged from distress; and that being so, I think that the replication is insufficient, and that the demurrer must be allowed.

BOLLAND, B.—The question for the opinion of the Court in this case is raised upon a demurrer to the replication; and the point upon which we are called upon to decide is, whether the boat, which has been taken as and for a distress for the arrears remaining unpaid of certain annuities and yearly sums mentioned in the plea of the defendant, was liable to be distrained.

It may be laid down as a general rule, that all goods that are found by a landlord on the premises demised to a tenant are liable to be distrained by the landlord for rent due to him in respect of such premises, whether the goods be the property of his tenant or of a stranger, provided they are not privileged by law from distress. Lord Chief Justice *Willes* in *Simpson v. Hartopp* (a), (a case that

(a) *Willes*, 512.

was twice argued, and fully considered by the Court of *Common Pleas*), states, in delivering the judgment of the Court, that there are five sorts of things which at common law were not distrainable.

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1. Things annexed to the freehold.

2. Things delivered to a person, exercising a public trade, to be carried, wrought, worked, or managed in the way of his trade or employ.

3. Cocks and sheaves of corn.

4. Beasts of the plough and instruments of husbandry.

5. The instruments of a man's trade or profession.

The three first sorts were absolutely free from distress, and could not be taken by the landlord though there were no other goods. The two last were only exempt *sub modo*, when there was distress enough without taking them. Let us then look to the circumstances under which the boat in question was taken, in order to ascertain whether it can be legally brought within either of the five grounds of exemption.

The plaintiff contends that the boat was not liable to be distrained; because he says in his replication that he is a manufacturer of and a trader and dealer in alkalies, and that such manufacture is a manufacture of great public benefit; that great quantities of salt are required in the manufacturing such alkalies, and that he, as such manufacturer, requiring salt for the purpose of his manufacture, sent and took his said boat to the salt works mentioned in his replication, and that at the time of the seizing and taking the said boat, it was at the said salt works for a temporary purpose only, and for the benefit of trade and manufacture, viz. the purpose of obtaining, receiving, and taking salt from such salt works to his manufactory, and that the boat did not remain on the premises for any unreasonable time.

It appears to me to be clear that the boat of the plaintiff cannot be said to come within either of the 1st, 3rd, 4th, and

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5th rules of exemption, nor can it, but by an overstrained and forced construction, a construction that I do not think the Court can adopt, be brought within the 2nd rule of exemption. If this be correct, it follows then that the non-liability to distress must rest upon some other foundation; and it has been contended at the bar, that it can be put upon the benefit to trade alone. I cannot however find any authority to support that position, to the extent that is in this case contended for. Things used in the way of trade are under some circumstances not liable to distress:—a horse standing in a smith's shop to be shod, or in a common inn; cloth or garments in a tailor's shop; materials for cloth in a weaver's shop; corn or meal sent to the mill or market (*a*); goods delivered to any person in the way of his trade, or to a carrier for hire. *Gisbourn v. Hurst* (*b*). But in each of these cases the privilege from distress is put on other grounds than the mere benefit of trade. The reported cases that come nearest to the present are those of the yarn carried to be weighed at a private beam, if in the way of trade, *Rede v. Burley* (*c*); or of the horse that had carried corn to a mill to be ground, and, during the grinding of the corn, was tied to the mill door. In these cases, the goods and the horse taken were held to be privileged from distress for rent; but the Court, according to the Reports, appears to have mainly proceeded upon the ground of the goods being under the personal care of their owner at the time of the taking (*d*). The boat in the present case had no such protection: it was left by the owner, and the privilege contended for is put, as attaching to the boat, upon the benefit to trade only. As, therefore, it does not appear to me that the boat comes within either of the five rules of exemption laid down in *Co. Litt.* 47. a.

(*a*) *Co. Lit.* 47. a.

(*b*) 1 *Salk.* 250.

(*c*) *Cro. Eliz.* 596.

(*d*) *Noy*, 68; *Cro. Eliz.* 549;

1 *Lord Raym.* 386; 3 *Burr.* 1498;

1 *Bl.* 483.

and pointed out by the Court in *Simpson v. Hartopp*, and as the owner had, by leaving the boat, taken away that protection, which, in *Rede v. Burley*, was thrown round the goods, and was the ground upon which the Court held them privileged from distress, I am of opinion that the boat was legally distrained, and that judgment must be for the defendant.

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PARKE, B.—The facts of this case, as they appear on the pleadings, and so far as they are necessary to be stated, in order to raise the point discussed before us, are these :

On the lands out of which the annuity issued, the manufacture of salt was at the time of the seizure carried on, and the produce of the manufacture was then sold generally, as an article of merchandize, to all persons who chose to buy it, and carry it away in their boats. The plaintiff's boat was lying in a canal on the same lands, in the place where the salt was usually sold and delivered to customers, and for the purpose of receiving on board salt by him intended to be bought; and before the expiration of a reasonable time for that purpose, was distrained by the defendant. The fact that the plaintiff himself carried on a trade, and wanted the salt for the use of that trade, as alleged in the replication, I do not think it necessary to consider. It does not appear to me to give the barge a greater privilege than if it were sent by a person not a trader; although it is to be observed, that, in one case, some of the judges mention the trade of the owner of the chattel as material; *Rede v. Burley* (a). The question then is, whether the boat was, under these circumstances, privileged from distress. It is a point of some importance; for this is only one amongst many instances which may occur: such would be the case of carts sent to be loaded in a wholesale warehouse, or at a land-

(a) Cro. Eliz. 596.

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sale colliery, casks left in a brewery or distillery to be filled, and the like.

It is admitted on both sides, that there is no decided case which is expressly in favour of the privilege; and on the other hand, that there is none expressly against it. In order, therefore, to decide the question, we must ascertain what the principle is on which the exemption is founded, as it is to be collected from the authorities, and decide according to that principle.

Upon consideration of these authorities, it is clear that the principle of the exemption is the public good: that is, that all men may freely, and without interruption, or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me, that, in order to give it full effect, we ought to hold that not merely chattels are privileged from distress which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt, which are *necessarily* placed there, and whilst they are there *in order to enable their owner to enjoy the full benefit of the trade or business, as it is there carried on.*

It is not, I think, because the chattels are to be worked upon the lands so chargeable, (though that is the most familiar case), but because they are necessarily placed on those lands, that the privilege is allowed by the law: and if goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them.

I proceed to show that this is clearly the principle on which the exemption is founded.

The proposition which is referred to in some of the cases as a rule, and is first laid down in *Gisbourn v. Hurst*, and adopted by Lord C. J. Willes, in *Simpson v. Har-*

topp (a), is, “that those goods are privileged which are delivered to any person exercising a *public* trade or employment, *to be carried, wrought, or managed* in the way of his trade or employ.”

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This proposition, though perfectly correct affirmatively, and quite comprehensive enough to include the cases then under consideration, is confessedly too narrow; for it does not include in it many cases in which the privilege clearly obtains; as, for instance, goods sent to market, or a horse or vehicle sent with goods there, or sent to, or waiting for goods to be brought from, the place where the trade or employment is carried on. The rule must therefore be couched in more comprehensive terms. I would observe, however, that the present case may possibly fall within this narrower definition, if the boat was delivered to, and to be loaded by, the trader: but I incline to think it is not sufficiently averred in the replication, that the persons carrying on the salt works were to load the boat, or to have possession of it; and therefore the boat cannot be said to be in any way delivered to the traders, to be by them “wrought or managed.”

I may also observe, with reference to one part of this proposition, that there appears to be no dispute (b) but that the word “public” is to be understood to refer to every trade or employ, carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals: although it be not “public” in the sense that all the king’s subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not—a predicament which is peculiar at this day to an innkeeper, or perhaps a carrier also: though Lord *Holt*, in 12 *Mod.* 484, considered it to

(a) Willes, 514. (b) See *Adams v. Grane*; *Brown v. Shevill*.

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belong to all other trades which a man professed to carry on for all persons indiscriminately.

I now proceed to consider the authorities.

The first is the *Year Book*, 22 Ed. 4, 49. *Brian*, who was Chief Justice, seems to put the privilege from distress on the ground that the goods were with the trader *by authority of law*; that is, that the trader was bound to receive them, and had a lien on them: a rule which would unquestionably be too limited at this time; and indeed, the Chief Justice was only citing the cases of exemption from distress, to shew that such chattels were not distrainable however long they were left on the lands demised, on the ground of the obligation to receive, and the consequent lien.

In the next case, 7 Hen. 7. 1. b., the Court say, that “things in a common inn cannot be distrained, *for the prejudice it would cause to the common weal*, nor in a market or fair, where things are taken to be bought.” Here, the benefit to the public from free communication and buying and selling, is clearly avowed to be the principle on which the exemption proceeds. So, in the third case, which is *Brooke’s Abr. Distress*, 251, pl. 70, which is as follows:—“Vide libro *Rastell*, que stuffe misè oue tailor, fuller, shereman, weaver, miller, et hujusmodi, ne seront distrenie, car ceux artificiers sont pour le common weale; et eadem lex alibi deequo in communi hospitio.” It then goes on to say, that the artificers and innkeepers have both a lien on the goods.

The rule laid down by *Co. Litt.* 47. a., is in these terms: After stating that a distress must be of things whereof a valuable property is in some body, he says, “Valuable things shall not be distreined for rent, for benefit and maintenance of trades, by which consequent are for the *common wealth*, and are there by authority of law, as a horse in a smith’s shop shall not be distreined for the rent issuing

out of the shop, nor the horse, &c. in the hostry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn and meal in a mill, *nor in a market*, nor anything distreined for damage feasant, for it is in custody of the law, *and the like.*" This rule certainly does not confine the privilege to goods delivered to another to be *carried, wrought, or managed* by him in the way of his trade. It states the principle of the exemption to be the common good for the maintenance of trades; and it then gives illustrations of that principle, many of which are cases of goods so delivered, but not all; for the horse in the hostry, and goods sent to a fair or market, are not so delivered.

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Lord Chief Baron *Gilbert*, on *Distresses*, p. 35, states the rule to be as follows:—"Things sent to public places of trade, as cloth in a tailor's shop, yarn in a weaver's, a horse in a smith's forge, and the like, are not distrainable; *for it is of public utility that the shops of traders should be privileged from the lord's distress for his rent*; for otherwise no man could supply himself with the necessities of life without the danger of losing them for another's debt, and, therefore, the landlord cannot distrain these things for the rent of the shop." Mr. Justice *Blackstone*, in 3 *Comm.* 7, adopts pretty nearly the language of Lord Chief Justice *Gilbert*:—"Valuable things *in the way of trade* shall not be liable to a distress; as a horse standing in a smith's shop to be shod, or at a common inn, or cloth at a tailor's house, or corn sent to a mill or market; for all these are protected and privileged *for the benefit of trade*, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers."

The principle upon which the exemption is founded, appears, I think, therefore, with great distinctness from these authorities to be the protection of trade; that is, not directly for the encouragement for the traders them-

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selves, but in order that all the King's subjects may freely enjoy the benefit of trading with them, and supply themselves with the necessaries and commodities of life; and where the expression is used that "goods are deposited *by authority of law*," I take the meaning to be, that in the case of trades which are public, (in the sense in which I consider that term to be used), and of public markets, the law gives authority to all to bring those goods on the land in which such trade or market is carried on, by implication from the fact of its being so carried on for the use and benefit of all persons; and that the principle of the rule is the public good and the freedom of commerce, is recognised in several modern cases; among others, those of *Gillman v. Elton*, and *Thompson v. Mashiter*.

If this be the principle of the rule of exemption, it seems to be inconsistent with the established mode of judicial decision to lay down a rule which is to include one class of goods only which fall within the mischief which the law is meant to remedy, and exclude another equally within the same mischief, merely because there is no case in which it has yet been held that such goods are privileged. A reference to the modern cases, as well as the language of the text books themselves, shews that the early instances, those of innkeepers, smiths, tailors, fullers, weavers, and millers, are treated only as *examples* of the rule; not, as has been observed by Mr. Justice *Park* and Mr. Justice *Richardson*, in 3 *B. & B.* 82, as limiting or comprehending the whole exception, but merely by way of illustration; and, accordingly, the exemption has been allowed in cases within the same mischief, such as factors (*a*), wharfingers (*b*), auctioneers (*c*), and finally, carcass butchers (*d*); in all which cases goods are *neces-*

(*a*) *Gilman v. Elton*, 3 *B. & B.* 75; 6 *Moore*, 243.

(*b*) *Thompson v. Mashiter*, 1 *Bing.* 283; 8 *Moore*, 254.

(*c*) *Adams v. Grane*, 1 *C. & M.* 380.

(*d*) *Brown v. Shevill*, 2 *A. & Ellis*, 138; 4 *Nev. & Man.* 277.

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sarily placed in their hands; necessarily I mean in this sense, that they must be placed there if the public, who chose to become their customers, are to have the full benefit of those trades, in the mode in which the traders choose to carry on their trade, and have held themselves out to the public as carrying it on: for, in most of the established instances of exemption, it is not a matter of *absolute* necessity that the customer should deliver his goods into the hands of another. He might send for a tailor, or smith, or weaver, or carcass butcher, to his own house; and he might sell his goods by auction or otherwise on his own premises; but if he chooses to employ the trader in the mode in which he carries on his trade, he cannot help placing the goods in his possession. If, then, goods in the hands of such traders are exempt when necessarily placed on the premises charged with the rent, in order to enable all persons to have the benefit of the trade there carried on, by the working or managing the goods, and that for the good of the public, and on the principle that it is to be protected, it seems to me that all goods ought equally to be exempt, upon the same principle, when necessarily placed there, in order to secure to all persons the benefit of such trade, though it may not be received in the same way. The ground of the exemption is not that the goods are to be worked up or managed, but that they are necessarily to be placed on the premises of the trader in the way of his trade, if that trade is to be made available to the public. What is to be done with them is immaterial.

In the present case, the carrying on of the trade in the mode in which the salt manufacturer held himself out as carrying it on, that is, by selling salt to all who should send their boats to his works, necessarily required, in order to enable the public to avail themselves of the trade, that they should send their boats there; and, if so, it seems to me, that, upon the principle of the protection of

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trade, for the benefit of the customers, the boats sent for that purpose were not liable to be distrained. If they were, it would follow that the salt, if loaded on board, would be distrainable also; for no distinction could be made. It is no objection, in my mind, that the owner of the boat might possibly, if he had pleased, have brought himself within another exemption from distress, founded on an entirely different principle, by keeping the boat in the actual possession of himself or his servants during the whole time it was placed on the premises charged with the rent. I can find no trace of authority for saying, that the privilege of exemption, for the benefit of trade, has ever been limited to those cases in which the owner of the chattel could not have done so. On the contrary, in the case of the blacksmith, it is clear that the owner of the horse might have waited and kept watch during the time that his horse was shod, and yet that is one of the established cases of exemption. In other acknowledged instances of exemption, the same might have been done, though with more inconvenience. If a coat were delivered to a tailor to be mended, would the privilege depend on the length of time which the repairs would require, and would it cease to exist if the time was so short that the owner might have conveniently waited? I conceive that this circumstance makes no difference; and no where is it said that the privilege is to be confined to those cases in which the owner could not conveniently have kept possession during the time that the chattel was deposited on the lands charged with the rent. The exemption was introduced for the freedom of trade and the benefit of the community, and that principle requires that the goods should be protected when placed on the premises of the trader, without imposing on the owner the inconvenience of keeping a constant watch over them; and I think, for the reasons above given, it applies to every case in which a chattel is necessarily brought on the premises of the

trader, in order to enable the owner to enjoy the benefit of the trade. *Exch. of Pleas,*
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I have before observed, that there is no authority expressly deciding against the privilege, as I have stated it; nor is there any which is even impliedly against it. The only modern case in which the privilege has been held not to exist, was that of *Wood v. Clarke* (a), in which it was decided that stocking-frames sent with materials to a weaver were not exempt, for it was properly held that the fact of the frame and materials being sent together made no difference, and that it was not *necessary* for the protection of trade that the privilege should exist with respect to implements of trade, whether sent by the employer, or hired or borrowed from another.

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For these reasons I am of opinion that the plaintiff is entitled to our judgment.

LORD ABINGER, C. B.—I agree that the judgment ought to be for the defendant. By the general rule of law, all goods found upon the premises of a tenant who is indebted to his landlord for rent, are liable *prima facie* to distress. That is the general rule. The Courts of justice have engrafted upon that rule certain exceptions; and by those exceptions, which are clearly established, we are bound. The question in this case is, whether this is one of the exceptions. Now it is not the exception of the goods being in the personal possession of the party to whom they belong. That is one of the exceptions, and it is founded on a paramount rule, that there shall be no exercise of any right which is accompanied with the danger of breaking the public peace. In that respect the goods are protected, not only if they belong to a stranger; but if the tenant himself is riding a horse on his own premises, that is not the subject of distress, for the same reason.

(a) 1 C. & J. 484.

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Another exception is, where the goods are going to, or perhaps coming from, a public fair or market, to which all mankind are invited or supposed to go for the immediate purposes of their own traffic. A third exception, within which it is attempted to bring the present case, is, where the trade is of such a nature as that the goods which are employed upon the premises are wrought or manufactured, or that something is done with them there. Now, looking at every one of the cases in which that exception has been acknowledged or established, it will be found that the trade itself consists in dealing with other men's goods. Take the familiar example of the blacksmith's shop: the landlord there does not let to the blacksmith his shop that he may shoe his own horses only, but takes a rent from the man for exercising a trade which consists in shoeing other people's horses. If the landlord were allowed to distrain the horses sent to be shod in that shop, he would be in fact destroying the trade for which he was receiving rent. So, in the case of a tailor: formerly, the practice was, not for tailors to furnish their customers with the goods themselves, but to receive the cloth and work it up into garments: therefore, a tailor was supposed to come within that rule, for his trade was understood to consist in working up other men's materials. So of the wharfinger, whose trade consists in receiving and accepting as a deposit other men's goods, and not his own. So of a factor, who has no goods of his own to carry on his trade, and whose trade therefore consists entirely in dealing with other men's goods. Now, I cannot see that this case is similar to any one of these. This is the case of a boat being found upon the premises of the tenant: the boat is sent there for the purpose of receiving a cargo of salt, but the cargo not being ready, the boat is left on the premises, not in the possession of the plaintiff. Then it is like any other goods on the premises. The boat was not sent there for the purpose of being repaired, in which

case I do not know that the principle would not extend to a boat-builder, under certain circumstances; neither did the trade which the tenant carried on consist in dealing with other men's boats or property. I do not agree that it was necessary to the trade that other men's boats should come there; nor do I see, that if the cargo of salt had been shipped into the boat, and allowed to remain on the premises, not in the possession of the plaintiff, it would have been free from distress. If the cargo itself would not, why should the boat be? There is no case that I know of, in which goods have been held to be liable to distress, where the carriage is exempt; therefore, in this case, as the salt itself was not exempted, so I say the boat was no more exempted; for the boat is but the adjunct, and follows the same rule as the goods loaded in the boat may be bound by. It may be true that there might be more public convenience in the rule suggested by my brother *Parke* than in the other. I do not profess to have any opinion upon that subject; and I am afraid of trusting to my own judgment with regard to the public good, as a principle upon which we are to make rules or to engraft exceptions. I do not know whether the time may not come when the public good may require that all goods should be exempted from distress. It is not very long ago since I met with a suggestion made by an ingenious foreigner for settling disputes in *Ireland*; that suggestion was, that every tenant should be declared to have an absolute right in the land he occupied (a); and I have no doubt that, under certain influence, that might soon become a very popular opinion in *Ireland*. In a case perfectly new, to which the law furnishes no analogy, where the Judges are called on first to establish a rule, we must, according to our own imperfect lights of public convenience, advert to it: for such is the nature of the law of *England*, and indeed of the law of all countries, that cases not provided for by the

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(a) Raumer's 'England in 1835,' vol. iii. p. 198.

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contemplation of the legislature, must, as they arise, be determined by the good sense of the Judges, in analogy, as far as they can, to the former cases; and if that analogy is not perfect—if it cannot be traced satisfactorily to the understanding, so as to find some principle established by decided cases or rules, which may meet the immediate case, then you are at liberty to consider which is the safest course to adopt for the public convenience, and you must exercise your own limited judgment as to what may be most for the public convenience. It appears to me that this case does not fall within any one of the exceptions I have adverted to, and that there is no decided case analogous to it. Every one of the excepted cases is a case in which the trade is one that consists in dealing with other men's goods. That being the principle, it appears to me that I must agree with the other learned Judges, that the judgment should be for the defendant.

Judgment for the defendant.

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A testator by his will devised different estates, consisting of houses and land, to different devisees, (some of whom were of his own name,) to some in fee, and to others for life only; and by a re-

THIS was an action of ejectment, in which issue having been joined, by the consent of the parties, and by the order of a Judge, the facts were now stated for the opinion of this Court on the following case.

By indenture of the 9th of *October*, 1804, made between *Edward Earl of Derby* of the one part, and *John Spencer* of the other part, the premises in question were devised and granted unto the said *John Spencer*, his heirs and by a re-

siduary clause, devised all the rest, residue, and remainder of his messuages, land, &c., not theretofore disposed of, to his wife, her heirs, executors, administrators, and assigns for ever. The following clauses were added by the testator, immediately before executing the will—"I do further give to my wife, this house wherein I now live; also the cottage, and all the building, cattle, and everything belonging to me in and about this house."—"I also entail my land to the *Spencers'* male heir so long as one shall remain." The testator's own name was *Spencer*:—*Held*, that the devise to the wife of the residue was not affected by the subsequent specific devise, or by the devise to the *Spencers'* male heir; that the devise of the residue, and the specific devise to the wife, were not inconsistent, and might both stand together; and that the clause as to the entail, was either unintelligible, or inapplicable to the property devised to the wife.

and assigns, for the lives of three persons therein named, and for the life of the survivor of them, if the heirs male of *Thomas* first Earl of *Derby*, of the name of *Stanley*, should so long continue, subject to the rent, covenants, and agreements therein expressed.

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Livery of seisin was duly made to the said *John Spencer*, who thereupon entered into possession of all the premises, and was thereof seised and possessed for the said term until and at the time of his death.

After becoming, and whilst seised and possessed as aforesaid, namely, on the 25th day of *December*, 1820, the said *John Spencer* made his will, executed and attested as is by law required for passing estates *pur autre vie*, of which will the following is a facsimile copy:—

“ This is the last will and testament of me, *John Spencer*, of *Redvales*, within *Bury*, in the county of *Lancaster*, gentleman, made whilst in health, and of sound and disposing mind, memory, and understanding, in manner following:—First, I do hereby direct my executors hereinafter appointed to pay off and discharge all my just debts, my funeral and testamentary expenses, and the costs of the probate and execution of this my will, out of my personal estate. And if my personal estate should be insufficient for that purpose, I charge my real estate with the payment of such deficiency: and subject as aforesaid, I do hereby give and devise to my nephew, *John Spencer*, otherwise *Holt*, the natural son of my sister *Betty*, and to his heirs and assigns, *all that cottage or dwelling-house in which he now resides, situate in Redvales aforesaid, for and during the term of the natural lives by which I hold the same under the Earl of Derby, to enter thereupon from the day of my decease, and I do hereby also (a) give and*

(a) The words in italics were scored through in the original, and the following note was subjoined to them in the case:—“ It

is admitted that the words scored through, were struck out by the testator, immediately before executing his will; and describe the

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bequeath unto the said *John Spencer*, otherwise *Holt*, and to my brother, *James Spencer*, all those messuages, cottages, or dwelling-houses, with the appurtenances to the same respectively belonging, situate at *Bedlam Green*, within *Bury* aforesaid, to hold the same unto the said *John Spencer*, otherwise *Holt*, and *James Spencer*, their executors, administrators, and assigns equally, as tenants in common, to enter thereupon immediately after my decease. And I do hereby also give and devise unto *Alice Cheetham*, wife of *Moses Cheetham*, of *Heywood*, all that messuage or dwelling house, with the shop and appurtenances to the same belonging, situate in *Heywood* aforesaid, formerly in my occupation, on condition that she pay unto my wife, *Anne Spencer*, the sum of 100*l.*, which I direct she shall pay before she enters thereupon, which sum of 100*l.* I give to my wife for her own use; to hold the same unto the said *Alice Cheetham*, her heirs and assigns for ever, on such conditions as aforesaid; and in case she shall refuse to pay the same, then I give and devise the said messuage, shop, and premises, to my wife, her heirs and assigns; and I do hereby authorize and empower my wife, by will or other disposition, to give or dispose of the sum of 100*l.* at her death, in such way and manner as she may think proper, the same to be paid and discharged out of my personal estate; and if I should not have so much money or securities for money at my death, then I do hereby charge my messuages, buildings, and premises situate at *Wrigley Brook*, within *Heywood* aforesaid, with so much as my personal estate, not including my household goods and furniture, shall fall short. And I do hereby give and bequeath unto my wife all and singular my household and other goods and furniture,

premises in question; subject to the question of the admissibility of any evidence to this effect, to affect the construction of the will."

beds and bedding, plate, linen, and china, to and for her own use and benefit absolutely. And I do hereby also give and devise all those two messuages or dwelling-houses, with the buildings, land, and premises thereto belonging, situate at *Cut Yate* within *Spotland*, to my wife, for and during the term of her natural life. And in case my nephew, the said *John Spencer*, otherwise *Holt*, should survive my wife, then immediately after her decease I give and devise the same to the said *John Spencer*, otherwise *Holt*, and his assigns, for and during the term of his natural life. And immediately after the decease of the survivor of them, my said wife and nephew, I do hereby give and devise the same unto and equally to be divided amongst the children of my said nephew, share and share alike, and their respective heirs and assigns, as tenants in common. And in case he should die without lawful issue living at his decease, I do hereby give and devise the same unto and equally to be divided amongst all and every the sons of my brother, *James Spencer*, and to their respective assigns during their several natural lives. And after the decease of the sons of my brother *James*, and as they shall respectively die, I give and devise the part and share, parts and shares of such of them so dying, unto and equally to be divided amongst all and every the children of my nephews, share and share alike, as tenants in common. And I do hereby also give and devise unto my wife, *Ann Spencer*, all those several messuages or dwelling houses, situate at or near *Wrigley Brook*, within *Heywood* aforesaid, with all and every the outbuildings, gardens, land, and premises to the same belonging, for and during the term of her natural life; and immediately from and after her decease, I do hereby give and devise and bequeath the same, subject to the eventual charge thereupon as hereinbefore mentioned, unto my natural son, *James Ogden*, otherwise *Spencer*, for and during

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the term of his natural life. And immediately after his decease, I give and devise the same unto my nephew, the said *John Spencer*, otherwise *Holt*, in case he shall survive the said *James Ogden*, otherwise *Spencer*, for and during the term of his natural life, and after the decease of the survivor of them, the said *James Ogden*, otherwise *Spencer*, and *John Spencer*, otherwise *Holt*, then I do hereby give, devise, and bequeath the same unto and equally to be divided amongst all and every the children of the said *John Spencer*, otherwise *Holt*, lawfully to be begotten, if more than one, share and share alike ; and if only one, then the whole to such only child, and his or her heirs, executors, administrators, and assigns, during my estate and interest therein. But in case the said *John Spencer*, otherwise *Holt*, should die without leaving lawful issue, or in case of his leaving such who should die under age, without lawful issue, then, after the decease of the said *James Ogden*, otherwise *Spencer*, and *John Spencer*, otherwise *Holt*, and the issue of the said *John Spencer*, otherwise *Holt*, in manner aforesaid, then I do hereby give, devise, and bequeath the said messuages, buildings, land, and premises, situate at or near *Wrigley Brook* aforesaid, unto and equally amongst all and every the sons of my said brother *James*, during their respective natural lives. And immediately from and after the decease of any of them, and as they shall respectively die, I do hereby give, devise, and bequeath the part or share, parts or shares, of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, administrators, and assigns, as tenants in common. And I do hereby also give and devise to my wife and her assigns, for and during the term of her natural life, all that messuage, farm, and tenement, with the cottages, outbuildings, and other appurtenances to the same belonging, called *Gorse Hill*, situate in

Heywood aforesaid, which I lately purchased from *Edward Monday*; and immediately from and after her decease, I do hereby give and devise the same to my natural daughter *Mary Ogden*, otherwise *Spencer*, for and during the term of her natural life. And immediately from and after the decease of the survivor of them, my said wife and *Mary Ogden*, otherwise *Spencer*, I do hereby give and devise the same unto and equally amongst all and every the sons of my said brother *James*, during their respective natural lives. And from and after the decease of any of them, and as they shall respectively die, I do hereby give, devise, and bequeath the part or share, parts or shares of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, and administrators and assigns, as tenants in common. And I do hereby also give and devise unto my wife and her assigns, during the term of her natural life, all that my messuage, cottage, or dwelling-house, with its appurtenances, situate at *Dawson Fold*, within *Heywood* aforesaid; and immediately after her decease I give and devise the same unto my wife's niece, *Elizabeth Pedley*, and her assigns, for and during the term of her natural life; and immediately from and after the decease of the survivor of them, my said wife and *Elizabeth Pedley*, I do hereby give, devise, and bequeath the same unto and equally to be divided amongst all and every the sons of my said brother *James*, during their respective natural lives. And from and after the decease of any of them, and as they shall respectively die, I do hereby give, devise, and bequeath the part and share, parts and shares of such of them so dying, unto and equally to be divided amongst his children, share and share alike, and their respective heirs, executors, and administrators, as tenants in common; and all the rest, residue, and remainder of my messuages, buildings, land, hereditaments, and premises, and all my personal and other estate and

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effects, *not hereinbefore disposed of*, I do hereby give devise, and bequeath unto my wife, *Anne Spencer*, her heirs, executors, administrators, and assigns for ever, or for and during all my estate, right, title, and interest therein. [I do further give to my wife this house wherein I now live; also the cottage, and all the building, cattle, and every thing belonging to me in and about this house, *Redvales*. I also make my wife sole executor, and at her decease my ~~executors~~ (a), *James Spencer*. I also entail my land to the *Spencer's male heirs* (b) so long as one shall remain."] (c).

The testator died on the 27th of *December*, 1820, without altering or revoking his said will; and the said *Ann Spencer*, his widow therein named, and who survived him, proved the said will, and entered into, and until her death remained in possession of, the premises in question. On the 14th of *March*, 1834, she made her will, which was duly executed and attested, and contains amongst other the following words: "I give and devise unto my brother, *James Ainsworth*, and my nephew, *James Thomas Pedley*, all my estate and interest in the messuages and premises which I now occupy at *Redvales*, and the cottage, buildings, and appurtenances thereto given to me by the will of my late husband, for their own absolute use and benefit."

In *October*, 1835, she died, without having altered or revoked her said will, and leaving, her surviving, the said *James Ainsworth* and *James Thomas Pedley*, in her will named as aforesaid, and who are the above-named defendants.

George Spencer, the lessor of the plaintiff, is the heir-at-law and next of kin of the testator, *John Spencer*. One of the *cestui que vies* named in the said indenture is still

(a) So in the original.

(b) So in original.

(c) "The words within brackets were inserted by the testator in his own hand, immediately after strik-

ing out the words struck out in the first part of the will, and before executing the will, and describe the premises in question."

living, and the heirs male of *Thomas*, first *Earl of Derby*, of the name of *Stanley*, still continue.

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The question for the opinion of the Court was, whether the said *Ann Spencer*, under the will of the said testator, *John Spencer*, took the whole estate and interest which he had in the premises in question.

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The following were the points stated in the margin of the demurrer book:—

It will be contended for the lessor of the plaintiff, that the express devise of the particular premises in question to the wife, excludes those premises from the operation of the general devise of residuary estate, and that the wife, as to the premises in question, did not take any estate or interest extending beyond her own lifetime.

It will be contended for the defendants, that *Ann Spencer*, the wife of the testator, took the entire interest of the testator in the premises in question, under the general devise to her of the residue of the estate.

Cresswell, for the lessor of the plaintiff.—Under this devise the testator's widow, *Ann Spencer*, took only a life estate in the premises in question. The estate having been granted to the testator, his heirs and assigns, *per autre vie* only, the devise to the wife, without more, would convey only a life estate. In *Doe d. Jeff v. Robinson* (a), where the tenant of certain lands, granted to him and his heirs *per autre vie*, devised them to *A. B.*, without saying more, and *A. B.* died during the lifetime of the *cestui que vie*: it was held that the heir of the devisor was entitled to the lands as special occupant. Unless something appears on the face of the will which indicates a clear intention that the wife was to take a greater estate, the heir-at-law of the devisor will be entitled as special occupant. The residuary clause will no doubt be relied on; but that precedes the devise in ques-

(a) 8 B. & Cr. 296; 2 Man. & Ry. 249.

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tion ; and at the time that the residuary clause was inserted in the will, there was a devise before of this property to *John Spencer*, his heirs and assigns. [Lord *Abinger*, C. B.—We must look at the will as though that clause were not in it. We can only notice the erasure as a fact. *Parke*, B.—We are to say what is the meaning of the words which were contained in this paper at the time the deviser signed it.] It is submitted, that it may be considered in the nature of a contemporaneous exposition. In *Strickland v. Maxwell* (a), an instrument of demise was produced in evidence, by which the plaintiff agreed to let, &c., *for the term of one year*. Most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy for one year only, and many of them appeared applicable only to a tenancy determinable by a notice to quit. The document appeared on the face of it to have originally contained words creating a tenancy *from year to year*, and the above words as to the term for one year only remained. And it was held that the words struck out might be looked at to shew what the intention of the parties was. [Lord *Abinger*, C. B.—You can only give it in evidence to explain a latent ambiguity. *Parke*, B.—No matter what the testator intended at a former period; the question is, what did he intend when he executed the will?] It is laid down in *Sheppard's Touchstone*, 402, that, in testaments, the last will is of the greatest force; and, therefore, between two repugnant clauses in a will, the latter will be effectual. Now here, the residuary clause in the will, and the subsequent specific devise of this estate to the wife, are inconsistent, and therefore, according to the rule above laid down, effect ought to be given to the latter disposition. *Sims v. Doughty* (b); *Constantine v. Constantine* (c). Putting the residuary clause out of the question, there cannot be a doubt that a

(a) 2 Cr. & M. 539.

(b) 5 Ves. 243.

(c) 6 Ves. 100.

life estate only would be created; but the residuary clause would give the whole interest, which is inconsistent. It is admitted, that where an estate is devised in a former part of a will to a person for life, and then afterwards the testator adds a residuary clause, giving an estate in fee, the Courts have held that the clauses were not inconsistent, and that the former clause may reasonably be enlarged by the latter: that is, because there the testator goes on to devise more—to dispose of that which he had not before disposed of. But there is no case in which it has been decided, that where the clauses in the will are placed as they are in this, the residuary clause can have any such effect, when it precedes the specific devise of the estate for life. Suppose this testator had given all his estates to A. in fee, and had afterwards given one of them to A. for life: that would be inconsistent; and that is substantially the present case. [Lord Abinger, C. B.—It is only when the clauses are necessarily inconsistent that you must reject the former clause.] Effect ought to be given, if possible, to the whole will; but here, if effect be given to the residuary clause as to this estate, the specific devise will have no operation whatever; whereas, if it is held that this estate did not pass under the residuary clause, effect would be given to the specific devise to the wife, and there would be no intestacy as to this, because by the last clause the testator has entailed it on his own male heir. *Doe v. Garrod* (a); *Counden v. Clarke* (b). There is another inconsistency, that the latter clause, “I also entail my land on the *Spencer’s* male heir, so long as one shall remain,” applies to all that has gone before. [Parke, B.—You say, that “my land” must mean the whole of his real property, so that he would give to his wife an estate for life, and then an estate to his male heir in tail. It may be worth while to consider, whether that clause is not a revo-

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(a) 2 B. & Adol. 87.

(b) Hobart, 29.

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cation of every devise, except the devise to the wife, and to the heir male in tail. Can you make sense of the devise to *Spencer's* heir male? What is the meaning of *Spencer's* heir male? Is it his own heir male, or the head of his family?] It is either his own heir male, or his brother's heir male. In the absence of evidence to shew that he meant the contrary, it must be taken to mean his own heir male.

Coltman, contrà.—There are two objections to the last clause of this will.—*First*, it is a devise of “my land,” simply; it is, therefore, uncertain what land he means: *secondly*, it is uncertain as to the person who is to take. *First*, it will not affect the land devised to the wife, for that is a devise of a house and building, and although a devise of land will, in general, carry the houses which are upon it, that is only when the testator has not used the word land in contradistinction to the word houses. In *Jarman's* edition of *Powell on Devises*, 186, it is said—“But though the word lands will, unaided by the context, carry houses, or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses it in contradistinction to house. As, where a devisor, having a messuage at *L.*, and a messuage and lands at *W.*, devised his house at *L.*, with all other his lands, meadows, pastures, with their appurtenances, lying in *W.*; the house at *W.* was held not to pass.” That was the case of *Ewer v. Heydon, Moore*, 359, pl. 491, also reported in 2 *Anderson*, 123. Here, the testator in the different devises he has made has always drawn a distinction between houses and land; when he means to devise houses he uses the term houses, and when he means land he uses that term. [*Parke, B.*—The case does not find whether the testator had any land besides that specifically devised before.] That certainly does not appear. But this devise cannot be extended beyond its terms to mean “all

my land." It is apprehended that it means *land* previously given—not *houses*. But if it might mean that, it is too uncertain. *Secondly*, there is an uncertainty as to the person to whom the land entailed is to go. The words, "to the *Spencer's* male heir," are not a sufficient description of any person. It might mean the son of *James Spencer*, or any other of the *Spencers*; and it is, therefore, not sufficiently certain for the Court to put any construction upon it. [*Parke, B.*—This is that part of the will where he has struck out the letter "s" in the word "heirs." He leaves estates to *John Spencer* and *James Spencer*, remainder to their children and their heirs—he might mean to restrict the *Spencers* from alienating.] It does not appear who was the object of the testator's bounty, and it is quite uncertain as to what land it applies to. The construction contended for on the other side would revoke nearly the whole of the will. Then, as to the argument that the special devise is inconsistent with the residuary clause: it is a fallacy to say that they are inconsistent, as both may stand together. It is said that, because the specific devise comes after the residuary clause, it is therefore inconsistent: it is admitted on the other side, that if the specific devise had come first, there would have been no inconsistency. In *Doe d. Jeff v. Robinson* (a) it was certainly held, that where the tenant of lands granted to him and his heirs *per autre vie*, devised them "to *A.B.*," without saying more, and *A.B.* died, living *cestui que vie*, that the heir of the devisor was entitled to them as special occupant. But that case is an instance of a legal construction of intention only. There is no case in which a residuary clause has been held to be repealed by a subsequent specific devise. The cases which affect residuary devises are fully stated in *Jarman's* edition of *Powell on Devises*, Vol. 2, c. 6, p. 102; and the ge-

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neral rule is, that all that a testator has, which is not otherwise disposed of, passes under the residuary clause, unless it appears from other parts of the will to be the clear intention of the testator that the estate should not pass under it. In *Doe d. Moreton v. Fossick (a)*, Lord *Tenterden* says—" I think the more modern doctrine is, that where the words are large enough to carry a remote reversion, it will pass, unless there be something directly shewing the intention to have been otherwise. The negative must be proved." Here there is no such clear and manifest intention, nor any necessary inference to be gathered from the will, that this estate should not pass under the residuary devise.

Cresswell in reply.—The first objection is, that the word "land" in the last clause is not sufficient to pass anything but land; but in the case cited of *Ewer v. Heydon*, the intention of the testator was clear, that the house should not go along with the land. But here, how does it appear that the testator used the word "land" in contradistinction to house? It must therefore be taken on the general rule, that land is sufficient to pass a house. *Secondly*, it is said that the person to take is uncertain, and that the devise is inconsistent, because previous estates tail are given to the heirs male; but that is not so, for they are to take estates as tenants in common in fee. The testator might have changed his intention, and limited it to the male heir of the *Spencer* family. There is no doubt that he meant to give it to the male heir of his own family. If the clause is not absolutely insensible, it must have effect given to it. Then, it is not stated whether the defendant claims under the residuary clause or the specific devise. The specific devise cannot be enlarged by the residuary devise which precedes it. It is admitted on the other side, that the specific devise is not sufficient to con-

(b) 1 B. & Adol. 188.

vey an estate of inheritance. If so, the life estate given by the specific devise in the last clause is inconsistent with the fee previously given by the residuary clause. It is not consistent to give a larger estate first, and then a smaller estate. It must be assumed that the testator has changed his intention.

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LORD ABINGER, C. B.—I am of opinion that the defendants are entitled to retain this estate. If the last clause had been sufficiently explicit, it would have been incumbent upon the Court to give effect to it, and there would have been great difficulty in the case. If it had clearly appeared that the testator intended to give his estate to his heir, it would be inconsistent with the specific estates previously given in the will, and, coming last, must have operated as a revocation of them; but it appears to me not to be sufficiently intelligible to enable us to give it any effect. First, there is no clear *designatio personæ*. The heir male of the *Spencers* may mean his own heir male, or that of his brother, or of some other family of that name, which is too ambiguous. The probability is, that he wished to do that which the law will not allow, namely, to restrain the alienation of the property which he had previously given. It then comes to the second question, which was first mentioned; whether the bequest of *Redvales* to the wife, which, if it stood alone, would have conveyed only an estate for life, is so inconsistent with the previous clause, as to amount to a revocation thereof. It appears to me that the argument of the plaintiff is founded on this fallacy. The general rule is, that where a testator makes a devise in one part of a will, and another in a subsequent part, so inconsistent that both cannot stand together, the last is to prevail. But that rule only applies where the intention of the testator is perfectly clear from the language of the will. The Courts of law, when they hold

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that a devise to a person, without more, passes only an estate for life, act upon a rule of construction, which is independent of the intention of the testator. The rule is adopted to avoid all question as to the intention, and is allowed to prevail in many cases where a testator has meant to give more than a life estate, but has failed to do so by express words: we cannot, therefore, say that this bequest is necessarily inconsistent with his design, as expressed in a former part of the will. It seems to me that the testator, not being aware of the effect of the residuary clause, which gave his wife the whole, meant to give it to her by this bequest; and therefore he has done nothing more than unnecessarily repeat a part of the previous devise. If he had given the *Redvales* estate to her and her heirs, and afterwards gave to her the *Redvales* estate, there would be no necessary inconsistency. I waited to ascertain whether there had been any case upon this point; but I do not find that there has been any decision to the effect, that a devise to *A.* and his heirs for ever, and afterwards a devise to *A.*, without more, are necessarily inconsistent. We are bound to give effect to the whole of the will, if we can; and it appears to me that we cannot imply an intention in the testator to cut down the previous estate.

PARKE, B.—I entirely concur; and it appears to me that the defendants are entitled to retain this estate. The first question is, whether the use of the words, “I entail my lands on the heir male of the *Spencers*,” makes any difference in the will. The words are very obscure: there is great difficulty in determining the meaning of the terms “my land,” and the “*Spencer’s* male heir.” It is enough for the Court to say, that the clause is either unintelligible and void, or inapplicable to the property in dispute. If the words “my land” relate to land only, they are not applicable to the present devise, which is of a house; and I am

of opinion, either that they are absolutely void, because of their insensibility, or immaterial, as not relating to the subject matter of this devise. They may have the effect of limiting the estates previously given to the *Spencers*; or the object of the testator may have been to restrain them from alienating the estates which he has so devised; but what effect they may have upon that property it is not necessary now to determine. The second question is, whether the additional clause turns the residuary bequest into an estate for life? I am of opinion that it does not. There is no doubt that, when the testator has put his name to the will, the whole must be taken together, and that no part of it is to be rejected, if it can have an effect given to it; and the proper rule is, to consider, in each will, whether there is a total impossibility of reconciling every part. There is no doubt that where two parts of a will are inconsistent, the last is to be given effect to. But is there any inconsistency in this case? First, there is a general devise of the residue; secondly, there is the particular bequest. It appears to me that they are by no means irreconcilable, and that this latter was only meant by the testator to say more expressly, that his wife shall possess that property. It is very true, that if this clause stood alone, it would have only a limited effect; but the former clause cannot be cut down by it, since the two are not irreconcilable. If the second devise had been, “to my wife *for her life only*,” there would have been an inconsistency resulting from the use of the word “only,” and the two clauses would have been irreconcilable. But there is no inconsistency here, and therefore they may both stand, and the effect of them is to give the wife an estate in fee.

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BOLLAND, B.—The general residuary clause would pass the fee to the wife; and I am of opinion that the additional clause does not alter it. The clause devising this property at the beginning of his will having been struck

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out, the testator merely added the last clause, more surely to secure the house to his wife. In all the former devises to his wife, he particularly gave the estates to her for her life—here he has not used the same language. In *Williams v. Thomas* (a), where, after a devise to one and her heirs of certain lands in *A.*, and other devises to the same person, her executors, administrators, and assigns, of leasehold interests in *B.*, *C.*, and *D.*, there was a devise of all the residue of the testator's estate and effects, real and personal, whatsoever and wheresoever, not before disposed of, to the same devisee, *her executors, administrators, and assigns*, for her own use absolutely, it was held that the latter devise would carry a distant reversion in fee in the lands in *B.* There Lord *Ellenborough*, C.J., said, "It was properly admitted that the words of the residuary devise, giving all the rest of his estate and effects, real and personal, whatsoever and wheresoever, not before disposed of, to his wife, her executors, &c., for her own use and benefit absolutely, were competent to carry this reversion, unless rebutted by something else in the will, shewing that he did not mean to pass it. But the omission of the word *heirs* in that clause, which is introduced in others, is relied on for this purpose. But where the words of the residuary clause are so strong and clear for carrying the fee in this reversion, we cannot collect a contrary intent from the mere omission of the word *heirs*, which is fully supplied by other words."

GURNEY, B.—I concur in opinion with the rest of the Court. There is an express devise of the residue to the wife in fee, and nothing in the next clause which is necessarily inconsistent therewith.

Judgment of *nolle prosequi* to be entered for the defendants.

(a) 12 East, 141.

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WHITFIELD v. HODGES.

IN this case *Fish* had obtained a rule to shew cause why the judgment entered up should not be set aside, and why an exoneretur should not be entered on the bail-piece. It appeared from the affidavits that a writ of *capias* had been sued out by the plaintiff against one *Surridge*, and that *Surridge*, having been arrested, the now defendant became bail for him. The action proceeded to issue, and notice of trial was given on the 9th of *November* for the next *Essex* Assizes. On the 24th of *December*, *Surridge* gave the plaintiff a bill of exchange for the amount of the debt for which the action was brought, and paid the costs incurred up to that time. The bill, which was payable two months after date, was dishonoured on its being presented for payment when due. Notice was then given by the plaintiff's attorney to *Surridge's* attorney, that he should proceed to try the cause. On the 27th of *February* an order was made by Mr. Baron *Gurney*, that, on payment of the debt and all subsequent costs, including the costs of briefs, on or before *Tuesday* then next, (which was the 1st of *March*), all further proceedings should be stayed, and in default thereof, that the plaintiff should be at liberty to sign final judgment, and issue execution thereon. The costs were taxed, and the amount having been paid to the plaintiff's attorney, he, on the 29th of *February*, gave the defendant a month's further time to pay the debt; but he afterwards signed judgment on the order. The commission-day at *Chelmsford* was the 9th of *March*. On the 6th of *April* a *ca. sa.* was issued against *Surridge*, returnable on the 22nd, and on the 23rd the plaintiff commenced this action against the present defendant; and the defendant not having pleaded in due time, the plaintiff signed judgment. On the first day of this term, *Fish* obtained the above rule, on

Where the plaintiff, in the progress of a cause, agreed to give the defendant a month's time to pay the debt, the time expiring before judgment could be obtained, and final judgment not having been in fact signed before the arrangement was entered into:—
Held, that the bail were not discharged.

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the ground that time had been given to the defendant in the original action, and that therefore the bail were discharged.

Erle and *G. T. White* shewed cause.—*First*, the time was not extended beyond the period at which the plaintiff could have obtained judgment and execution according to the regular course of practice. Time was not therefore given to the original defendant.—*Secondly*, the Judge's order was not absolute for judgment, but conditional only. But, *thirdly*, it was a mere private arrangement between the plaintiff and the defendant, and was similar to the case where a cognovit has been given; and it was held in *Stevenson v. Roche* (a), that bail are not discharged by the plaintiff's taking a cognovit from the principal, unless time be thereby given. The plaintiff relinquished nothing by taking the Judge's order. No judgment was then signed, and the plaintiff was not entitled to sign judgment.

Platt and *Fish* in support of the rule.—It is clear, as a general rule, that if time be given to the original defendant, the bail are discharged. Now, when by the plaintiff's agreement the judgment and execution are delayed, the defendant does obtain time; and when during the progress of a cause the plaintiff becomes entitled to sign judgment on an earlier day than by the ordinary practice he would be entitled to do, the bail have a right to call upon him to do so, and if he fails to do so, they are discharged. That was the case in the present instance. Any substantial arrangement by which the time for signing judgment and issuing execution is stayed, is sufficient to discharge the bail, as they are injured thereby. [*Alderson*, B.—How are the bail injured by this arrange-

(a) 9 B. & C. 707.

ment? They undertake that the defendant shall be present in Court on a given day. Here the plaintiff does not discharge him from that appearance.] The judgment appears to have been signed on a misunderstanding.

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LORD ABINGER, C. B.—If the Judge's order had been a hostile proceeding, and not the result of an arrangement between the parties, there might have been a great deal in the argument for the defendant; but, being a voluntary agreement, it falls within the principle of those cases where a *cognovit* has been given, by which the plaintiff has become entitled to sign judgment at an earlier period than he would otherwise be enabled to do. The same principle allows the party even within that period to give a further extension of the time. Here no judgment was signed before the order was made. The bail were therefore not prejudiced.

PARKE, B.—I am of the same opinion. I should be sorry to throw any obstacle in the way of arrangements of this description. If this objection were to prevail, the circumstance of the defendant's being out on bail would often prevent arrangements which are made at chambers for the saving of expense. In this case, the order having been made on the 27th of *February*, a new agreement is entered into on the 29th for an extension of time. Now, either the agreement was binding upon the plaintiff, or it was not. If it was not, and the plaintiff merely promised to extend the time, the bail are not discharged. If it was binding, I am of opinion that the parties are competent, before final judgment has been signed, to agree to an arrangement to extend the time, as was done in the present instance. Suppose at the beginning of a week an arrangement is made, and the plaintiff finds that he is more likely to obtain payment of his debt by granting an extension of the time agreed upon, it would be a great hardship

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if that could not be done without discharging the bail. The parties then, on the 29th, which was *Monday*, were competent to make this agreement; and it being within the original limit of time, the bail are not discharged. If the judgment had been actually signed before the agreement was entered into, the case would have been different.

BOLLAND, B., and ALDERSON, B., concurred.

Rule absolute for setting aside the judgment, but discharged as to the entering an *exoneretur* on the bail-piece.

JAMES FARRAR v. BESWICK.

Trover.—The declaration stated that the plaintiff was possessed as of his own property of certain cattle, to wit, four horses, which the defendant converted and disposed of to his own use. Pleas—*first*, that they were not the property of the plaintiff; *2ndly*, that a judgment was recovered against *J. F.*, and that

TROVER.—The declaration stated that the plaintiff was *lawfully possessed as of his own property* of certain cattle, to wit, four horses, &c., which the defendant had converted to his own use. Pleas, *first*, that the cattle in the declaration mentioned were not at the time of the alleged conversion and disposal thereof, nor are they, or any of them the property of the said plaintiff, nor was he lawfully possessed of the same *as of his own property*, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged: concluding to the country.

The *second* plea, after setting forth a judgment recovered in the county court of *Lancaster*, in an action brought the defendant, (a sheriff's officer), seized them under an execution against the said *J. F.*, *the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff.* To which the plaintiff replied, that they were the cattle and property of the said plaintiff *modo et formâ*. At the trial, it was found by the jury, that they were the property of the plaintiff and *J. F.* jointly:—*Held*, that the issue raised by the defendant was, whether the cattle were the sole property of *J. F.*, and the jury having found that they were the joint property of the plaintiff and *J. F.*, that the plaintiff was entitled to recover.

by one *William Cottrell* against one *Joshua Farrar*, the issuing of a writ or precept in the nature of the writ of *levari facias*, directed as well to certain other persons as to the defendant, a bailiff of the sheriff, commanding him to cause to be levied of the goods and chattels of the said *Joshua Farrar*, the debt and damages recovered, and the delivery of the writ to the defendant to be executed, averred as follows :—“ By virtue of which said writ or precept, he, the said defendant, as such bailiff or officer as aforesaid, afterwards, to wit, on the day and year last aforesaid, and within the time in the said writ or precept specified for the execution thereof as aforesaid, and according to the commandment and exigency thereof, and within the jurisdiction of the said Court, and the bailiwick of the said Sheriff, to wit, in the county aforesaid, seized and took the said cattle in the said declaration mentioned, *the same being the cattle, goods, and chattels of the said Joshua Farrar, and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff*, as for and in execution of the said writ or precept ; and in pursuance of the said writ or precept, and for the full and due execution thereof, he, the said defendant, as such bailiff or officer as aforesaid, then and there, to wit, on &c., in the county, and within the jurisdiction aforesaid, converted and disposed of the said cattle, goods, and chattels, by a fair, proper, and lawful sale thereof, in order to satisfy the said judgment so as aforesaid obtained by the said *W. C.*, such sale thereof being duly authorized and required by and according to the customs and usages in that behalf, from time immemorial used and approved of in the same county, in the execution of such and the like writs or precepts as aforesaid.” The plea then went on to aver the return of the writ, together with the money so levied under it, and concluded—“ which said seizing and selling, &c., are the same supposed grievances in the said declaration mentioned, and whereof the said plaintiff hath above complained, &c.”

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The replication took issue on the first plea; and to the second the plaintiff replied, "that the said cattle in the said declaration mentioned were at the said time when &c., and still are *the cattle and property of the said plaintiff, and not the cattle of the said Joshua Farrar*, in manner and form as is above in the said last plea in that behalf alleged."

At the trial before *Parke, B.*, at the last *Spring Assizes at Liverpool*, it was found by the jury, that *James Farrar* and *Joshua Farrar* were joint owners of the horses in question, upon which the learned Judge directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. Accordingly, in *Easter Term* last, *Alexander* obtained a rule to enter a nonsuit.

Cresswell and *Wightman* now shewed cause.—On these pleadings, the defendant has admitted the conversion. The only question raised is, whether the horses were the property of the plaintiff; and the jury have found that the plaintiff was entitled to an undivided moiety of them. That being so, the plaintiff has a right to maintain this action. *Stancliffe v. Hardwicke (a)*. [*Parke, B.*—I expressed an opinion at the trial that the plaintiff was entitled to a verdict for a moiety of the value of the horses. It was suggested that the plea might be taken as justifying the conversion of *Joshua's* moiety.] The plea is to the whole declaration; then how can it be said to be a plea as to a moiety? A sale by one joint tenant amounts to a conversion. [*Parke, B.*—I apprehend that if they had framed the plea in this way, that *Joshua Farrar* was interested in these cattle, and therefore the defendant took them in execution, the plea would have been good.] That may be doubtful. It is submitted that, under the

(a) 2 C. M. & R. 1.

new rules, this plea merely raises the question, whether the plaintiff had any property in these cattle. The defendant should have pleaded that he took them in execution to the extent of *Joshua's* interest in them: but it is quite clear here that he meant to say, that the whole property in these cattle was in *Joshua*. That is the question raised on these pleadings, and that was the issue on the trial. [*Parke, B.*—The true question is, is this an informal plea justifying the conversion; or is it a plea denying the plaintiff's title? I thought at the trial that it was merely a denial of the plaintiff's title to the property.] Supposing even that the defendant was entitled to take one moiety of the cattle, the sale of the other moiety was a conversion (*a*). Here he pleads that the whole was the property of *Joshua*, and that therefore he took the whole: if true, that would be a good plea; but it turns out not to be so; and therefore the defence fails, as he had no right to sell the whole. He has alleged a sole property in *Joshua*, which was material and necessary to be proved. [*Parke, B.*—I have never entertained any doubt, since the case of *Barton v. Williams* (*b*), that a sale by one of two tenants in common of the whole of their property is a conversion as to the share of the other. Only in this case they are not tenants in common. *Alderson, B.*—Would it be a good answer to the action, to say that the parties were jointly interested, and therefore he took the whole? *Parke, B.*—The case of a sale in market overt by one joint-tenant is beside this question, as that changes the property in the chattel at once as against the other joint-tenant. There is considerable doubt whether this is a conversion by the sheriff, or only the subject of a special action on the case. When I was at the bar, I used in these cases to declare in a special action on the case.]

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(*a*) 2 Wms. Saunders, note, 47 *h*.

(*b*) 5 B. & Ald. 395; S. C. on error, 3 Bing. 139; M'Clell. & Y. 406.

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The defendant pleads circumstances, which if true, are a bar. It is a most material question, therefore, whether they are the cattle of *Joshua Farrar* or not; and if they are not his sole property, then the plaintiff is entitled to recover.

Alexander, contra.—The question is, whether the defendant, an officer of the sheriff, is liable in trover for what he has done under this writ; and, secondly, is the plaintiff entitled to judgment on these pleadings. The horses were the property of *James* and *Joshua* jointly. An execution against *Joshua* is put into the sheriff's hands to be executed, and he would have neglected his duty if he had not taken the cattle, although another had an interest in them: he cannot, therefore, be liable for seizing them. Then is he liable for selling them? Though only a moiety of the property, perhaps, ought to have been applied to the purposes of the execution; yet each of the horses must be disposed of, as the sheriff could not sell a part of the horses. The mere handing them over to the purchaser was not a conversion; for each joint-tenant or tenant in common is entitled to the possession of the property in which they are mutually interested. If, then, the sheriff was bound by law to take and sell the cattle, he cannot be guilty of any conversion, or be made liable in trover. Secondly, if the sheriff has acted improperly in the sale in retaining the plaintiff's moiety of the money in his hands, and an action of trover was maintainable for the moiety, the plaintiff ought to have shewn that by way of new assignment. It is said, however, that on these pleadings the only issue is, whether these cattle are the sole property of *Joshua Farrar*. But the plea only follows the language of the declaration, and the same construction must be applied to the words of the plea as of the declaration. The issue therefore is, whether these cattle were

the sole property of the plaintiff as alleged in the declaration, which the jury have negatived.

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PARKE, B.—At the trial the defendant gave evidence to shew that these cattle were the property of *Joshua* exclusively, though on going further into the evidence, there was every probability that they belonged to the plaintiff and *Joshua* jointly. I told the jury, that, if they thought so, they ought to find for the plaintiff, being of opinion that the plea was nothing more than a special traverse of the plaintiff's title in the cattle. Of that opinion I still remain, though I entertained some doubt when the rule was moved for. The plea, in truth, avers that they were the sole property of *Joshua*. It was necessary for the defendant to allege that they were his sole property, or to shew that he had such an interest therein that the sheriff was authorized in seizing them. If the plea had intended to allege that *Joshua* had such an interest therein as the defendant might seize, that might have been inferred *prima facie* from the allegation that the cattle were the cattle of *Joshua*, and liable to be seized in execution: but it does not stop there; it goes on to say that they were not the cattle of the plaintiff. That averment must be taken to be equivalent to an averment that the plaintiff had no title to them. This is not a plea in confession and avoidance, it is nothing more than a traverse of the plaintiff's allegation of property in the declaration, with a special inducement. If the case had rested on the simple traverse in the first plea, the only question would have been, whether they were the property of the plaintiff; and the defendant would not have been allowed to shew that there was an execution creditor who had a right or interest in them. And it seems impossible to construe the allegation in the second plea, of their being the goods of *Joshua*, coupled with the allegation which follows, in any other sense than as signifying that they were the sole pro-

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perty of *Joshua*. I am by no means prepared to say, that if *Joshua* was jointly entitled to this property, the act of the sheriff would have been a conversion. As at present advised, though it is not necessary to give a conclusive opinion, I think that if the plea had stated that *Joshua* had a joint interest in these cattle, and that the sheriff seized and sold the whole goods to levy the execution, it would have been a good answer to this action. I have always understood, until the doubt was raised in *Barton v. Williams* (a), that one joint-tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel, unless it were sold in such a manner as to deprive his partner of his interest in it. A sale in market overt would have that effect. I do not, however, decide this case on that ground; but I consider the allegation as an assertion that the cattle were the sole property of *Joshua*. The replication re-asserts the averment in the declaration, that they were the property of *James*. On that understanding the verdict is correct. The defendant ought to have framed his special plea differently.

BOLLAND, B., concurred.

ALDERSON, B.—Taking the whole of the plea together, it amounts to an allegation that these cattle were the sole property of *Joshua*. The replication is merely a re-assertion of that which is stated in the declaration, namely, that the plaintiff has such an interest in the cattle as enables him to maintain the action. I think that the verdict was right.

GURNEY, B. concurred.

Rule discharged.

(a) 5 B. & Ald. 395.

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PALMER v. WALLER and Another, Executors of
WALLER.

TO an action of *assumpsit* against the defendants, as executors, upon a promissory note made by their testator, the defendants pleaded that the testator did not make the note; that the testator made it for accommodation and without value; and that the testator had paid the note. The plaintiff joined issue upon these pleas; and at the trial, a verdict was found for the plaintiff. The judgment was signed thereupon, and a writ of *fi. fa.* issued to the sheriff of the county of *Norfolk*, to levy the amount of the verdict, *de bonis testatoris si, et si non*, to levy the costs (49*l.* odd), *de bonis propriis*. The sheriff levied the costs *de bonis propriis*, and returned *nulla bona testatoris*. At the same time the plaintiff issued to the sheriff of the city of *Norwich*, where the defendants resided, a *testatum fi. fa.* to levy *de bonis testatoris si, et si non* as before, and the sheriff returned *nulla bona*. Upon this the plaintiff issued a writ of *scire fieri* inquiry to the sheriff of *Norwich*; and when the inquisition was taken, put in evidence the judgment. The undersheriff thought that the plaintiff was bound to give evidence of the defendants' having property of the testator in their hands, and so directed the jury: and he subsequently returned *nulla bona*.

If a defendant executor plead to the action, and do not plead *plene administravit*, the judgment against him is evidence of a *devastavit*; and if, after the production of such judgment upon a *scire fieri* inquiry, the sheriff returns *nulla bona testatoris*, the Court will quash the return, and award a new *scire fieri* inquiry.

On a former day in this term, *J. Jervis* obtained a rule to shew cause why this return should not be quashed, and a new *scire fieri* inquiry awarded; and he contended that the defendants by pleading over admitted assets, which, if not in their possession when the inquest was taken, had been wasted, and so the jury were bound to find a *devastavit*, as suggested in the writ. He cited *Erving v. Peters* (a).

(a) 3 T. R. 685.

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Biggs Andrews shewed cause.—The plaintiff, in cases like the present, usually proceeds by action on the judgment, and suggests a devastavit. This course is unusual. The judgment, if evidence of assets when that judgment was delivered, does not shew that the defendants have assets now ; nor is it evidence of assets in the bailiwick of *Norwich*. The assets may have been legally administered since the judgment. [*Alderson, B.*—If so, the defendants should prove that.] In *Erving v. Peters*, a devastavit had been returned ; and if the judgment alone is sufficient proof of a devastavit without a *scire fieri* inquiry, that inquiry is superfluous.

Jervis, contrà, having cited *Leonard v. Simpson (a)*, was stopped by the Court.

ALDERSON, B.—The judgment proves that the defendants had assets when it was delivered ; they have not shewn the subsequent disposition of such assets.

Rule absolute.

(a) 2 Bing. N. C. 176 ; 2 Scott, 335.

DOE d. Marquis of HERTFORD v. HUNT.

A tenant of a farm required that his rent might be reduced; the land-

lord refused : whereupon the tenant gave a notice to quit at *Michaelmas*, 1834. It was afterwards agreed that he should continue to hold on at a reduced rent, the notice continuing in force, until *Michaelmas*, 1835. Before that time arrived, the tenant offered to continue on as tenant at a certain rent, whereupon the landlord's agent wrote a letter, stating that the landlord had directed him to inform the tenant, that he could only consent to his offer as to the rent, from *Michaelmas* next to *Michaelmas*, 1836; provided he, the lessor, "could not find a tenant for the farm at the rent it appeared to him (the agent) to be worth, by the 1st of August." One C. having applied for the farm, the tenant refused to allow him to go over it, and C. made no offer:—*Held*, that it was an implied condition of the agreement, that the tenant should allow persons applying for the farm to go over it; and that condition not having been performed by him, the contract was at an end.

EJECTMENT to recover possession of a farm.—At the trial before *Gaselee, J.*, at the last Spring Assizes for

Suffolk, it appeared that the defendant had been for some years tenant to the plaintiff of a farm, at a rent of 575*l.*; which rent, in the year 1831, was reduced to 520*l.* In 1834, the defendant applied that it might be reduced to 400*l.*, which was refused; upon which the defendant gave a notice to quit at *Michaelmas*, 1834. It was afterwards agreed that he should continue to hold on for another year, at a reduced rent, the notice continuing in force as a notice to quit at *Michaelmas*, 1835. Before, however, that time arrived, the defendant made an offer to continue on at the rent of 420*l.*; upon which the agent of the Marquis wrote a letter to the defendant, containing the following passages:—"The Marquis of *Hertford* has directed me to inform you, that he could only consent to accept your offer of 420*l.* for the farm, for the year from *Michaelmas* next to *Michaelmas*, 1836, subject to the existing covenants, *provided I could not find a tenant for it at the rent it appeared to me to be worth, by the 1st of August*; and subject as well to the express understanding, that the notice you had given to quit your farm at *Michaelmas* next should be admitted between you not to be withdrawn, but to be carried over to *Michaelmas*, 1836. The Marquis also directed me to advertise your farm to be let in the *Ipswich* paper, and I shall send the advertisement for insertion in the next paper." It was accordingly advertised in the paper to be let at *Michaelmas* next. On the 9th of *July*, 1835, the defendant signed the following memorandum:—"Mr. *Hunt* has explained that his offer for the farm was 400*l.* only; and, subject to this correction, he assents to the terms proposed in Mr. *W.*'s (the agent's) letter. *J. Hunt.*"—A person of the name of *Catlin* made an application for the farm, but the defendant refused to allow him to see it, and consequently he made no offer. The defendant having refused to quit at *Michaelmas*, 1835, this ejectment was brought. It was contended for the defendant at the trial, that, under this

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agreement, the tenancy continued until *Michaelmas*, 1836. The learned Judge refused to nonsuit the plaintiff, but gave the defendant leave to move to enter a nonsuit. *Storks*, Serjt., having in *Easter* term last obtained a rule accordingly,

Kelly and *Gunning* now shewed cause.—In this case the tenant impliedly agreed to allow any person who wished to take the farm to be permitted to see it, as that was necessary to enable the landlord to let it. That was an implied condition to be performed by the defendant, and he having failed to perform it, the agreement to allow him to continue tenant for another year was at an end. Independently of the proviso contained in the letter, the concluding passage is very strong to shew that this was an implied agreement between the parties. “The Marquis also directed me to advertise your farm to be let in the *Ipswich* paper, and I shall send the advertisement for insertion in the next paper.” [*Alderson*, B.—You contend that his allowing persons to see the farm was necessarily a condition on the tenant’s part, but more especially from the latter part of the letter. Lord *Abinger*, C. B.—Is it certain that it amounted to any agreement at all? Is it not rather a proposal that the parties should come to an agreement after the 1st of *August* upon those terms, if the farm was not let in the mean time?] It may be so put; but, at all events, if the tenant fails to perform the condition, he relinquishes the agreement.

The Court then called upon

Storks, Serjt., and *Biggs Andrews*, in support of the rule.—*First*, there was no undertaking that the tenant was to allow any person to go over and inspect the farm; and therefore the tenant was at liberty to say that they should not go over the farm. And in the absence of any

clause to that effect in the agreement, the Court will not infer such an implied agreement: *Watson v. Waltham* (a). Besides, it appeared that *Catlin* was a person occupying land adjoining, and who knew the farm, and could not want to look over it. *Secondly*, it was incumbent on the lessor of the plaintiff to shew that he could get a better rent than 400*l.*, which the defendant had proposed to give, as it must be inferred that he was willing that he should continue tenant unless he had a higher rent offered. He ought to have shewn some substantial advance offered above the 400*l.*

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Lord ABINGER, C. B.—The rule must be discharged. There are two ways of looking at this case. The agreement is not a formal one. It appears to me to be merely an intimation which the agent makes of what the landlord is willing to do, which amounts to this:—"I cannot accept you as a permanent tenant, but am willing that you shall remain tenant for a year longer; but that is on this condition, that I shall have an opportunity, until the 1st of *August*, of letting it to another tenant." That is a mere intimation of an opinion of what he might be willing to do at the time. From the form of the letter, it looks like a substantive agreement, when that time comes, to make some terms with the tenant for a fresh tenancy. But even considering this to be a positive agreement, the condition is, in case the landlord shall not get another tenant before the 1st of *August*. If, then, Mr. *Hunt* prevents his landlord from performing that condition, he cannot avail himself of its non-performance. The agreement implies that the landlord shall take the usual means of getting a tenant. If the defendant meant to prevent him from adopting the usual method, he ought to have intimated it at the time. He did not do so. But before the 1st of *August*, it is ascertained that he does not mean to allow

(a) 2 Ad. & Ellis, 485; 4 Nev. & Man. 537.

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any person to see the farm. He practises a sort of fraud upon his landlord. To illustrate this: suppose the landlord had said—"I will continue you as tenant, provided my surveyor reports that your farm is in good condition;" and the tenant had said to the surveyor, when he went to make his survey—"I shall not let you go upon the farm." Can it be said that the meaning of the stipulation was, that the surveyor should make his report, but should not be allowed to see the farm? Surely it must be understood that the usual mode of making a survey should be adopted. It is manifest that that must be an implied condition, and if that is not performed the contract is at an end. How could a farmer be expected to say what rent he would give for the farm if he had no opportunity of going over it? In the construction of this, which is a parol contract, I think it was a necessarily implied condition, that the tenant should allow the person who might be desirous of taking it to come upon the farm to inspect it. Before the 1st of *August*, the tenant refused to perform that condition, and the contract was thereby put an end to.

BOLLAND, B.—I am of the same opinion. It was clearly a condition precedent to the completion of the contract between the parties, that the defendant should permit any person sent by the landlord, who was desirous of taking the farm, before he made an offer, to see it. There was a large space between 400*l.* and 520*l.*, at which it had been let: could the landlord or his agent ascertain the real value without an inspection? But it is said that *Catlin*, occupying land contiguous to it, could not require an accurate survey, and that it was not necessary for him to look over it; the answer to that is, that *Catlin* was of opinion that it was necessary for him to do so.

ALDERSON, B.—It appears to me, that, if there was an

agreement at all, it was not such as to waive the operation of the notice previously given by the defendant. The defendant comes to the agent, and says, "I will not consent to waive the notice which I have given, unless the Marquis will permit me to hold at the reduced rent of 400*l*;" that is the defendant's proposal to the Marquis, through his agent. The answer of the Marquis is, "I will not consent to take the rent of 400*l*. absolutely; but I will try until the 1st of *August* to let the farm at such a rent as my agent thinks it is fairly worth. If I do not let it before that time, I will permit you to keep the possession of it, at that rent, for another year." Then between that period and the 1st of *August*, the defendant prevents the Marquis from doing that which is necessary for the letting of it to another tenant. The parties then stand on their original rights. The tenant ought therefore to have gone out of possession at *Michaelmas*, 1835, when his notice expired.

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Rule discharged.

DOE *d.* GRAY *v.* STANION.

THIS was an action of ejectment, tried before *Bosanquet, J.*, at the last Assizes for the county of *Northampton*, when the following facts appeared in evidence.—The defendant had occupied the premises in question from the year 1828, as tenant from year to year to the lessor of the plaintiff.

A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord:—"1831, *Sept. 2. S. S.*

(the tenant) purchased an estate in the parish of *Corbey*, bought of *R. G.* (the landlord) at the sum of 100*l*. Received on account, 10*s*. *Mr. R. G.* is willing to let the sum lie, by paying 4 *per cent.*" *Held*, that, as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law.

A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase money, the agent of the lessor applied to him to give up possession. To which he answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it:"—*Held*, that this was no disclaimer; because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year.

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Subsequently, the defendant agreed to purchase the property, and on the 2nd of *September*, 1831, an agreement was entered into between the lessor of the plaintiff and the defendant, which was as follows:— “ 1831, *September* 2nd. *Samuel Stanion* purchased an estate in the parish of *Corbey*, bought of *Robert Gray*, at the sum of 100*l.* Received on account, 10*s.* Mr. *Robert Gray* is willing to let the sum lie, by paying 4 *per cent.*” The agreement was signed by the parties, and 10*s.* deposit paid.

On the 2nd of *October*, 1835. the agent of the lessor of the plaintiff demanded possession from the defendant. The defendant said “ *he had bought the property, and would keep it*; and he had a friend who was ready to give him the money for it:” on which the agent informed him, that if possession was not delivered, he should bring an action of ejectment. At the trial, it was contended on behalf of the defendant, that the tenancy from year to year was still subsisting, and that a notice to quit ought to have been given in order to determine it. The learned Judge however refused to nonsuit the plaintiff, but gave the defendant leave to move to enter a nonsuit. *Humfrey* having, in *Easter* term last, obtained a rule accordingly,

Waddington and *Mellor* now shewed cause.—The plaintiff is entitled to recover. *First*, the tenancy from year to year was determined by the defendant’s entering into an agreement to purchase the estate. The agreement to purchase amounted to a surrender of the term, inasmuch as that was inconsistent with the continuance of the tenancy. This falls within the rule as to surrenders by operation of law. The principle is this, that, where the tenant contracts a new relation with his landlord, which is inconsistent with the continuance of the former tenancy, a surrender of the former tenancy will be implied by

law (a). The law assumes that that has been done between the parties without which the new lease would have no operation. No doubt, if this had been a sale to a third person, it would have been subject to the tenancy from year to year: but, where the party purchasing is the tenant, he must be presumed to have done that which would enable the purchase to take immediate effect. Therefore, in the present case it is clear that the tenancy from year to year was determined, and the defendant became tenant at will only. No rent has been paid, and the defendant has relied on his purchase. There is no case to be found in a court of law, as to what is the effect of an agreement to purchase; but, in *Daniels v. Davison* (b), Lord Eldon says that an agreement to purchase would determine a tenancy at will, and adds, "Then, as to a tenancy from year to year, which the law favours, is the situation of a person, in possession as such tenant, different in equity with regard to third persons, if, making an agreement with his landlord to purchase the premises, instead of giving up the possession, and re-entering under that agreement, he retains the possession, without going through that ceremony?" If an agreement to purchase would determine a tenancy at will, upon the same principle it would determine a tenancy from year to year, as there is no ground for distinguishing the case of a tenancy at will from a tenancy from year to year in this respect. [*Parke, B.*—You must make out that, at law, the rent would cease to be payable on the 2nd of *September*, 1831, and that, if an action for use and occupation were brought, the agreement would be a good answer to it.] By the agreement it was stipulated that interest should be paid, and not rent. [*Parke, B.*—It depends entirely on the effect of that agreement. If it amounts to an agreement to purchase without any enquiry into the title, it may determine the tenancy; but, if it is an

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(a) 1 Wm. Saund. 236 a (n).

(b) 16 Ves. 252.

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agreement to purchase, provided a good title be made, can it be contended that the tenant was bound to pay the purchase money before that title had been investigated?] In *Hamerton v. Stead* (a), a tenant from year to year entered into an agreement, during a current year, for a lease to be granted to him and *A. B.*, and from that time *A. B.* entered and occupied jointly with him. And it was held that by this agreement, and the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted. But, *secondly*, assuming that the tenancy from year to year was not determined, there is evidence in this case of a disclaimer by the defendant of his landlord's title. When he was asked to give up the possession by the landlord's agent, he does not rely upon the existing tenancy, but sets up his own title under the agreement to purchase. After that disclaimer, he is not entitled to a notice to quit. *Bull. N. P.* 96. *Doe v. Williams* (b); *Bower v. Major* (c); *Doe d. Grubb v. Grubb* (d); *Doe v. Lord Cawdor* (e); *Doe v. Price* (f).

Humfrey, in support of the rule.—The tenancy from year to year was not put an end to by the agreement. It never could be intended that the defendant was to purchase without a good title, as there is an implied covenant for good title. Even if the agreement to purchase could have any effect in a court of equity in determining the tenancy, it is inoperative in a court of law. That point was not decided in *Daniels v. Davison*, for the question under discussion in that case could not have arisen if the agreement had put an end to the tenancy altogether. *Secondly*, there was no disclaimer. In all the cases of

(a) 3 B. & C. 478.

(b) Cowp. 622.

(c) 1 Brod. & Bing. 4.

(d) 10 B. & C. 816.

(e) 1 C. M. & R. 398.

(f) 9 Bing. 356; 2 M. & Scott,
464.

disclaimer, there must be a demand of that possession to which the landlord has a right by his demise. Here the landlord's agent demanded immediate possession, whereas, at that time, the landlord had no right to it. The demand was of something which he had no right to demand. The tenant says in effect, "I will not give up possession, because you have no right to it." The landlord had no right to demand instant possession, except upon his equitable title, on the defendant's refusal to complete the purchase. Besides, here the answer is only made in the character of vendee. It is not with reference to his character as tenant. In all cases in which it has been held to be a disclaimer, it was because the answer was inconsistent with the relation of landlord and tenant.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, which was an ejectment to recover a house, tried before my Brother *Bosanquet* at the last Assizes for *Northampton*, a point was reserved for the consideration of the Court, as to the right of the plaintiff to recover, without having given half a year's notice to quit. The defendant occupied from the year 1828, as tenant from year to year, at four guineas annual rent. On the 2nd of *September*, 1831, an agreement was drawn up, between the lessor of the plaintiff and the defendant, to this effect :—"1831, *September* 2nd. *Samuel Stanion* purchased an estate in the parish of *Corbey*, bought of *Robert Gray* at the sum of 100*l.* Received on account, 10*s.* Mr. *Robert Gray* is willing to let the sum lie, by paying 4 *per cent.*" The agreement was signed by the parties, and 10*s.* deposit paid.

On the 2nd of *October*, 1835, the agent of the lessor of the plaintiff demanded possession from the defendant. The defendant said, "*he had bought the property, and would keep it*, and he had a friend who was ready to give him

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the money for it," on which the agent informed him, that if possession was not delivered, he should bring an action. An action of ejectment was accordingly brought. The learned Judge directed a verdict for the plaintiff, reserving the point.

On the argument on shewing cause against the rule *nisi* for a new trial, it was insisted on the part of the plaintiff, that a notice to quit was unnecessary; and that on two grounds: *first*, that by the agreement of the 2nd of *September*, 1831, a new tenancy at will was created, which put an end to the tenancy from year to year, and that such tenancy at will was determined by a simple demand of possession from the tenant; *secondly*, that if the tenancy from year to year was not so determined, the defendant's declaration on the 2nd of *October*, to the agent of the lessor, amounted to a disclaimer. We are of opinion that neither of these reasons is sufficient to dispense with the usual notice to quit.

As to the first, there is no doubt but that if there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will: *Right d. Lewis v. Beard (a)*. It is not, however, the *agreement*, but the letting into possession, that creates such tenancy; for the person suffered so to occupy cannot, on the one hand, be considered as a *trespasser* when he enters, and on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be, that from the date of it, (or any other certain

(a) 13 East, 210.

time,) the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time; and the acceptance of such new demise at will would then operate as a surrender of the interest from year to year, by operation of law. But if the agreement is conditional to purchase only *provided* a good title should be made out, and to pay the purchase money *when* that should have been done, and the estate conveyed, there is no room for implying any agreement to hold as tenant at will in the mean time; the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not. And this is strongly illustrated by supposing such an agreement to be made by a termor for a long term of years, of considerable value beyond the reserved rent: in which case, it would at once strike any one as impossible to give this effect to the agreement. In such a case, no one would doubt but that the intention was that the lease should not be given up unless the purchase was completed. Is, then, the contract in question a contract of this conditional nature, to purchase for 100*l.*, *provided* a good title should be made and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for, in the first place, in contracts for the sale of real estate, an agreement to make a good title is always implied, of which the case of *Souter v. Drake* (a) is a strong instance; and in the next, it is out of the question to suppose that this defendant meant to be obliged to pay the purchase money, without some conveyance of the estate, although subject to a mortgage for the purchase money.

For these reasons, we think that the tenancy from year to year was not determined in this case by the defendant's

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(a) 5 B. & Ad. 992; 3 Nev. & Man. 40.

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entering into this agreement. What the effect of such a contract would be in a court of equity, it is quite unnecessary to consider.

The remaining question is, whether that which passed between the plaintiff's agent and the defendant, on the 2d of *October*, was a disclaimer, so as to supersede the necessity of a regular notice to quit.

In the earliest reported case on this subject, *Throgmorton v. Whelpdale* (a), it is said that such notice is necessary, unless the tenant have *attorned* to some other person, or done some other *act* disclaiming to hold as tenant to the landlord. In *Doe v. Williams* (b), Lord *Mansfield* says, where the *possession is adverse*, no notice is necessary; and in that case there had been an attornment, or what was equivalent, for the defendant defended as landlord to the tenant from year to year. But this rule is too narrow; and from subsequent cases, it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient. Lord *Kenyon*, in *Doe d. Williams v. Pasquali* (c), says, that "if the tenant puts *his landlord at defiance*, he might consider him either as a tenant or trespasser, and eject him without any notice to quit;" and in *Brown v. Major* (d), in the analogous case of a composition for tithes, the declaration of an occupier, who refused to set out his tithes in kind, insisting that he was *exempted by a modus*, was held to be a sufficient disclaimer of the composition, so as to dispense with half a year's notice to determine it; and in other cases, in which the declaration of the tenant has been held insufficient, [*Doe v. Pasquali* (e), *Doe d. Lewis v. Lord Cawdor* (f),] no question has been raised as to the necessity of some *act*

(a) Bull. N. P. C. 96.

(b) Cowp. 622.

(c) Peake, N. P. C. 197.

(d) 1 Bing. 4.

(e) Peake, 196.

(f) 1 C. M. & R. 398; 4 Tyrw. 852.

being done by the tenant, as distinguished from a disavowal by word or writing. *Exch. of Pleas,*
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But, in order to make a verbal or written disclaimer sufficient, it must amount to a *direct repudiation of the relation of landlord and tenant*; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough, as appears from the cases already referred to; nor will a mere refusal to pay rent, as appears from the case of *Doe v. Pasquali*. A refusal to deliver possession, or a declaration that he will continue to hold possession, cannot have that effect, at a time when the landlord has no right to claim it, as was the case in this particular instance. The only point therefore remaining is, whether the defendant saying that he had “bought *the property, and would keep it*, and had a friend who was ready to advance the money,” is, by necessary implication, a disavowal of the relation of tenant from year to year. We are all of opinion that it is not; because this is not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. The defendant had a double right, to enforce his bargain for the purchase of the estate, and to continue in the mean time to hold it as tenant from year to year; and this declaration is in truth no more than an avowal that he should insist on his contract of purchase, and was ready to perform it. This appears to us to be quite consistent with the continuance, in the mean time, of the tenancy from year to year. We therefore think the rule *nisi* for a nonsuit must be made absolute.

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Rule absolute.

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The sheriff is bound, since the Uniformity of Process Act, to arrest a defendant as soon as he can after the delivery of the writ of *capias* to him; and has not the four months in which to execute it.

Quære, whether he is liable to an action for negligence, in not arresting, when he has an opportunity, at the suit of the plaintiff, without proof of actual damage?

CASE against the sheriff of *Hampshire* for negligence. —The declaration stated, that *Benjamin Batten*, on &c., was indebted to the plaintiff in a large sum of money, exceeding 20*l.*, to wit, 86*l.* 8*s.* 4*d.*, upon and in respect of certain causes of action before then accrued to the plaintiff against the said *Benjamin Batten*. And the said *B. Batten* being so indebted, the said plaintiff, for the recovery of the said debt, heretofore, to wit, on &c., sued and prosecuted out of the Court of our Lord the now King, &c., against the said *B. Batten*, a certain writ called a *capias*, directed to the sheriff of the county of *Hants*, (setting out the writ at length). It was then alleged that the writ was duly marked and indorsed for bail for 86*l.* 8*s.* 4*d.*; and that the said writ so indorsed was afterwards, and within four calendar months from the date thereof, including the day of such date, delivered to the said defendant, who then was, and from thence until and at and after the expiration of the said four calendar months was sheriff of the said county of *Hants*, to be executed: that the said *B. Batten* at the time of the delivery of the said writ to the said defendant, and from thence for a long time, to wit, until a certain other day, to wit, the 9th *October*, 1834, was within the said sheriff's bailiwick; and the said sheriff during that period, and more than eight days before the death of the said *B. Batten* thereafter mentioned, might and could have taken and arrested the said *B. Batten* by virtue of the said writ at the suit of the said plaintiff, if he would so have done, whereof the said defendant so being such sheriff during all the time aforesaid had notice, and was during all that time, and more than eight days before the death of said *B. Batten*, to wit, on &c., requested by the said plaintiff so to do; yet the said defendant so being such

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sheriff as aforesaid, not regarding the duty of his office, but contriving &c., did not nor would at any time before the 9th day of *October*, 1834, or within a reasonable time for that purpose after the delivery of the said writ to him the said defendant to be executed as aforesaid, (although a reasonable time for that purpose elapsed between the delivery of the said writ and the commencement of the period of eight days before the death of the said *B. Batten* as thereafter mentioned) take, or cause to be taken, the said *B. Batten*, as by the said writ he was commanded; but therein wholly failed and made default. And the said *B. Batten* afterwards, to wit, on &c., being at large in the said bailiwick, to wit, on the 4th of *October*, 1834, met with an accident which he would not have met with if he had then been in the custody of the said sheriff; and by reason and in consequence of the said accident, the said *B. Batten* afterwards, to wit, on the 9th of *October*, 1834, died: whereby, and by means and in consequence of the premises, the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended, in and about his said suit so commenced and prosecuted against the said *B. Batten* as aforesaid, amounting to a large sum of money, to wit, the sum of 10*l*.

The defendant pleaded, *first*, that the said *B. Batten* was not indebted to the plaintiff in a sum of money exceeding 20*l*., *modo et formâ*; *secondly*, that he the said defendant from the time of the delivery to him of the said writ, and until the time of the death of the said *B. Batten*, did use all the diligence in his power to take the said *B. Batten*, as by the said writ he was commanded. The replication traversed this allegation.

The cause was tried before *Littledale*, J., at the last *Spring Assizes* for the county of *Hants*, when it appeared

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that *Batten* had signed a joint and several promissory note as surety for one *Mason*, who was in debt to the plaintiff; that subsequently *Mason* had conveyed to the plaintiff all his interest and equity of redemption in certain real property, "as a collateral security" for the said debt. The conveyance, being by way of mortgage, was to be absolute unless payment was made by a then future day; and it contained a covenant to pay the debt within that period. The debt not having been paid, it appeared that the mortgaged premises had been sold, and, after payment of a first mortgage, there remained the sum of 100*l.* to go in part payment of *Mason's* debt. In the conveyance to the vendee the second mortgage was recited, and then the conveyance went on—"And for the considerations aforesaid, and of the sum of 100*l.* to the said *Brown*, (the plaintiff,) paid by the vendee, the receipt whereof, and that the same is in full payment and satisfaction of all principal, interest, and other monies due upon or in respect of the said recited mortgage, the said (plaintiff) doth hereby acknowledge, and of and from the same doth fully and absolutely acquit, release, and for ever discharge the said vendee, and the said *George Mason*, and the said mortgaged premises, &c." This sum being insufficient to satisfy the debt, the plaintiff sued *Batten* upon the note, which had never been given up, for the amount remaining due after deducting the 100*l.* The writ in the original action was delivered to the sheriff on the 30th of *July*, and there was evidence to shew that *Batten* occupied a large farm in the county, which was well stocked, and that he attended to his business on the farm, so that the sheriff might have arrested him if he had thought proper to do so. *Batten* died on the 9th of *October*, in consequence of a fall from a horse. It was objected at the trial, that the debt was extinguished by the mortgage deed, and the covenant contained in it; but this objection was overruled. It was then contended that the action was not maintainable, in-

asmuch as the four months, at the expiration whereof the writ was returnable, had not expired ; and it did not appear that the writ had been returned, or the defendant ruled to return it. The learned Judge was of opinion that it was not necessary to wait until the writ had been returned ; and that the jury ought to give some damages, though he thought they ought to be nominal. The jury, however, found a verdict for the plaintiff for 40*l*.

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Dampier, in *Easter Term* last, moved for a nonsuit, or in arrest of judgment, or in reduction of damages.—The plaintiff ought to be nonsuited on two grounds :—*First*, *Batten* being a surety, not only time, but a release, was given to the principal ; and so *Batten* was discharged, and the sheriff had the same defence as *Batten*. It is true that the mortgage which gave a future day for payment, was a “collateral security ;” and that *Batten* put himself in the situation of a principal, and afforded the plaintiff the remedies of a principal as against him, by giving a joint and several note. But there was only *one* debt. If that debt was gone, then all were discharged. That debt was the debt secured by the note and by the mortgage, and was paid by the sale, and was the debt released. The plaintiff need only have released the land, or the vendee and the land ; but, if he releases *Mason* from the debt previously recited, he releases every thing.—He referred to *Allies v. Probyn* (a). [*Sed per Curiam*.—The debt released is the debt *quoad* the 100*l*. received. The mortgage debt only is released, but not the debt secured by *Batten's* note ; and there is no covenant not to sue on the note. There must therefore be no rule on that ground.] He then moved on the ground, that the declaration gave no ground of action, nor did the evidence : for, the writ is not alleged to have been returned, nor was it in fact returned : and the plaintiff states *Batten's* death on the

(a) 2 C. M. & R. 408.

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record, which is a discontinuance by the act of God. [On this point the Court granted a rule to shew cause; and also why the damages should not be reduced.]

On a former day in this term, *Erle* and *Crowder* shewed cause.—There are two questions in this case :—*first*, whether there is any cause of action against the sheriff at all; *secondly*, whether the plaintiff has sustained any legal damage which gives him a right to a verdict for 40*l.*, or even for nominal damages. First, it was shewn at the trial that the sheriff might have arrested *Batten* after the delivery of the writ to him, if he had used due diligence. It is a question of considerable importance what the sheriff's duty is, as to the time of making the arrest, since the Uniformity of Process Act. It is said, that, under the new form of writ, he is allowed the period of four months within which he is to execute it. If it is to be held that the sheriff may keep the writ in his pocket for four months without executing it, unless an order of a judge is obtained calling upon him to return the writ, there will be great laxity and delay in proceedings. But it is submitted that he is bound to execute the writ within a reasonable time after it has been delivered to him, and that he ought to execute it as soon as he reasonably can, and to use all due diligence for that purpose. He is guilty of negligence if he omits to take the defendant when he might have done so; and then the right of action vests. [Lord *Abinger*, C. B.—Suppose *Batten* had not died, and the plaintiff had said, “ ‘There he is, take him;’ ” might not the sheriff have said, “ ‘No, I will have him at the return of the writ;’ ” and if he has him then, is not that sufficient?] It is more reasonable to say that he is bound to take him immediately, as soon as he can, inasmuch as the writ is returnable on execution. The principle is the same as in writs of *fi. fa.* And in *Jacobs v. Humphrey* (*a*), it was

(*a*) 2 C. & M. 413.

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held that the sheriff is liable for neglecting to sell the goods seized under a *fi. fa.* within a reasonable time. Undoubtedly, the sheriff might formerly have let the defendant go at large until the return day of the writ; but, since the Uniformity of Process Act, the law is otherwise. That was thought an inconvenient law; and under the 2 Will. 4, c. 39, the sheriff has no given time in which to arrest the party; but by s. 39, a judge may order the writ to be returned when he thinks proper. The period of four months mentioned in the writ is only a time fixed, during which the sheriff is to execute his duty, and beyond which he is not to be held liable. [*Alderson, B.*—The writ is to last for four months, unless a judge orders that it shall be sooner returned. If you want an early return, why don't you go before a judge and obtain an order for its return?] The plaintiff does not know whether the defendant has been taken or not, and perhaps the judge would not grant the order until he is satisfied that the writ has been executed. *Secondly*, the plaintiff has sustained a damage, for which he is entitled to maintain an action. The plaintiff complains that he did not get two months' possession of the defendant, which he ought to have had. The death occurring at the end of the time does not take away a cause of action which had vested before. [*Lord Abinger, C. B.*—You have not shewn that you have sustained any damage by his not being taken.] If he had been arrested, he might have paid the money. [*Lord Abinger, C. B.*—Suppose the sheriff might have arrested him on a *Saturday*, and thrown him into gaol, whereby he might be kept in prison till *Monday*, before which time he could have no opportunity of procuring bail, can it be said that an action is to be maintainable, because if the sheriff had taken him on the *Saturday*, he might rather have paid the money than remain in prison over the *Sunday*? *Alderson, B.*—Is not the only damage you can rely upon, the delay in the suit, occasioned by his not

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being arrested before? We are not to go on speculative damages.] It is a question for the jury whether the plaintiff has sustained damage, and he may offer any evidence from which they may infer that he has sustained damage. What can a plaintiff shew more than that the defendant was at large a considerable time, in command of property sufficient to pay the debt, and the sheriff's neglect to take him?—it is a clear neglect of duty. [Lord Abinger, C. B.—We say that it is a speculation, and that you have no right to speculative damages. Suppose the sheriff had arrested the defendant, and he had paid the amount, with 10% to the sheriff, how could you be in a better situation at the beginning of the next term, when the defendant dies in the mean time?] It was a matter for the jury to say, whether, if taken, he would not have paid the debt. Besides, here the defendant is a public officer, and has been guilty of negligence and a breach of duty, and is therefore liable to an action, though a private individual might not. *Barker v. Green* (a), *Bales v. Wingfield* (b). [Lord Abinger, C. B.—In *Lewis v. Morland* (c), where a person was taken upon an attachment for non-payment of costs, which is in the nature of mesne process, and was afterwards permitted to go at large, but returned again into custody, and continued in custody at the return of the writ, it was determined that the sheriff was not liable to an action for an escape.] That was on the old writ, and there he had the defendant at the return of the writ, according to the exigency of it. The object of the new writ of *capias* was to expedite the proceedings in vacation. If it is laid down that the sheriff is to have the whole four months to execute the writ, it will be necessary, in every case, on issuing the writ, to obtain a judge's order, calling on the sheriff to return the writ. [Lord Abinger, C. B.—The only assign-

(a) 2 Bing. 317.

(b) 2 Nev. & Man. 831.

(c) 2 B. & Ald. 56.

able way in which you could have sustained damage is, that you might have filed a declaration sooner, but you could not have got judgment; and the party having died, instead of gaining, you would have lost by it.] In the case of an execution against the goods, it is said to be absolute damage for the amount indorsed on the writ, and that is put on the ground of negligence. [Lord *Abinger*, C. B.—According to your proposition, you must lay it down as a rule, that, if a writ be issued to-day, and the sheriff might have executed it the next day, but does not, and the party dies the day after, an action vests. The judges who made the new rules never contemplated that it was intended to alter the sheriff's responsibility.]—(It turned out afterwards, on inquiry by the Court, that there was no general issue pleaded; and the Court said, that that being so, the question as to whether there was any legal damage did not arise. They therefore directed the argument on the other side to be confined to the point as to the arrest of judgment.)

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Dampier and White, contra.—The judgment must be arrested, as the declaration does not shew that there has been any return made, or any return day past. In the old forms of pleading that was always done, *Stovin v. Perring* (a); *Moreland v. Leigh* (b); *Barker v. Green* (c). The language of the sheriff, indorsed on the writ, is the only thing which the Court can look to. The act 2 Will. 4, c. 39, does not affect the law of pleading, its object being merely to make all process uniform. There is nothing in that act to alter or affect the duties of the sheriff. By that act the sheriff has four months to make the arrest, and need not make any return until that time has expired. It is at the plaintiff's option to cause an earlier return day to be made. If he requires that, he may obtain a judge's

(a) 2 Bos. & Pull. 561.

(b) 1 Stark. N. P. C. 388.

(c) 2 Bing. 317.

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order under the 15th section, which will have the effect of fixing a particular day for the return. If in the interim the defendant dies, it is the plaintiff's fault for not obtaining such an order. There is no official notice to the Court as to what the sheriff has done, until there is a return; the Court cannot know in the mean time whether he has done his duty or not. He may have taken the defendant, and got his deposit, and by his death the bail may have been discharged, and the money returned. [*Alderson, B.*—You must go the length of contending, that, when a writ is delivered to the sheriff, which is not made returnable on any particular day, he is not bound to execute it within a reasonable time.] He may be bound to do so, but the defendant contends that the plaintiff cannot complain until he shews that the return day has passed. [*Alderson, B.*—Suppose the plaintiff suffers an actual damage by the sheriff's delay, which must now be taken to have been the case here, is there not a right of action?] Not unless it can be shewn that a return has been made, or that a return day is past. [*Alderson, B.*—In the old writ a return day was expressly inserted.] So under the power given to the judge, such a day may be inserted in the writ, by the effect of the order. [*Alderson, B.*—In the case of a writ of *fi. fa.* the sheriff is bound to execute it, and make a return within a reasonable time] No day is mentioned at all in that writ for the return. [*Alderson, B.*—Is it not the sheriff's duty now to execute the writ as soon as he can, and to make a return as soon as he can?] Not unless the plaintiff obtains a judge's order, calling upon him to return the writ. [*Alderson, B.*—The object of the act of Parliament was to enable a party to go on with the action in the vacation. Suppose the sheriff had executed the writ, but had omitted to return it, and a damage results therefrom, would not an action be maintainable?] That might be so, because he is bound to return the writ immediately on its execution. [*Alderson, B.*—Then, if

the act of Parliament makes it depend upon the conduct of the sheriff as to when the writ shall be returnable, can he be allowed to delay it for four months, by neglecting his duty?] A judge may order him to return the writ at any time, and it is the plaintiff's duty to obtain the order. [*Gurney*, B.—Why is the sheriff to be told to do his duty?—he ought to use due diligence. *Alderson*, B.—He is bound to use due diligence in finding the defendant. In process of execution, he is bound to execute the writ immediately, because it is returnable immediately on execution.] Until he is called upon by order to return the writ, it is submitted that he is not bound to do so, and that the action is not maintainable. Suppose *Batten* had given bail, and made a deposit,—which he may have done, it is not averred here that he has not done so: all that the plaintiff says is, that the defendant did not take him.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B.—(After stating the declaration, he proceeded as follows). When this case came to be discussed the other day, on a motion for a new trial, or in arrest of judgment, the Court entertained a long argument as to whether any and what damages could be recovered on the facts of the case; but all the discussion became nugatory, as it turned out that there was no plea of the general issue. There were two issues on the record, which were found against the defendant. One was, whether *Batten* was indebted to the plaintiff; the other, whether the sheriff had used due diligence in arresting him: so that the only question was what damages the jury ought to give. They gave 40*l.*, which was clearly unreasonable, and must be reduced. The question on which I certainly felt great doubt, does not therefore arise. If it had appeared on the face of the declaration that the plaintiff had not sustained any damage from the sheriff's negli-

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gence, the judgment must have been arrested ; and I do not think the plaintiff could have maintained the action without proof of actual damage. But the defendant, by not pleading the general issue to the declaration, must now be considered as having admitted the allegations in it : and there it is stated that the defendant neglected to take the defendant in the cause on the writ of *capias* when he might, and that in consequence of his not being taken, he afterwards died. However improbable that may be, it must be taken for granted, to be true ; and then it appears on this declaration, that the plaintiff has sustained a damage from the defendant's negligence. The defendant then being liable, the judgment cannot be arrested on this point. Another question agitated was, whether, since the new form of the writ of *capias*, the declaration should not have set forth the return day of that writ. That depends upon this, whether the writ is returnable immediately, or whether the sheriff has the four months to execute it. We think that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and, if he does not do so, that he is guilty of negligence, and will be liable for any damage which may result from that negligence. The rule must therefore be discharged, but the verdict must be reduced to 40s.

Rule accordingly.

SIEBERT and Another, Assignees of MITCHELL, a Bankrupt, v. SPOONER.

An assignment by a trader to a creditor of *all* his effects and stock in trade, is of itself an act of bankruptcy.

ASSUMPSIT for the use and occupation of certain pasture land, and the eatage of the grass thereon, due to the plaintiffs as assignees of one *Mitchell*, a bankrupt ; with counts for money had and received, and on an

account stated. Pleas, *first*, the general issue; *secondly*, *Exch. of Pleas, 1836.* that *Mitchell* never was nor is a bankrupt.

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At the trial before Lord *Denman*, C. J., at the last Spring Assizes for the county of *York*, the plaintiffs, in order to prove the act of bankruptcy, put in a deed of assignment dated the 26th of *August*, 1834, made between *Mitchell* of the one part, and the defendant of the other part, whereby, after reciting that *Mitchell* was indebted to the defendant in the sum of 400*l.* on bond, and also in the sum of 90*l.* on a simple contract debt, *Mitchell* assigned and conveyed to the defendant all his household goods and effects in his dwelling-house, all his tenant right in the farm occupied by him, and all his farming stock, horses, cattle, and all other his farming effects, and also all his stock in trade and utensils, and all other his personal estate whatsoever. The plaintiffs also gave in evidence indentures of lease and release, dated the 5th and 6th *September*, 1834, whereby *Mitchell* conveyed all his freehold property to the defendant. It appeared that *Mitchell* had been a cloth manufacturer, and had carried on business in partnership with another person. At the trial, it was contended for the plaintiffs that the deed of the 26th *August*, 1834, being a conveyance of the whole of the trader's effects, was of itself an act of bankruptcy. The defendant contended, that, to make it an act of bankruptcy, it must be shewn to have been executed fraudulently, with intent to delay or defraud his creditors; and the defendant endeavoured to shew, from the deposition of *Spooner* taken before the commissioners, which had been put in by the plaintiffs, that he the defendant had agreed to purchase the freehold estate from the bankrupt, and that the assignment of the personal estate was given as a security for the purchase money until the conveyance was executed. The Lord Chief Justice left it to the jury to say whether *Mitchell* had executed the deed fraudulently, with intent to defeat his other creditors, or not; because, unless it was

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executed fraudulently, it did not appear to him that it was an act of bankruptcy. The jury having under this direction found a verdict for the defendant, *Blackburne*, in *Easter Term* last, obtained a rule for a new trial on the ground of misdirection, citing *Stewart v. Moody* (a), *Carr v. Burdiss* (b), *Botcherby v. Lancaster* (c), and *Newton v. Chantler* (d). Against which rule

Milner now shewed cause.—The question is, whether this is a fraudulent deed within the meaning of the 6 *Geo. 4*, c. 16, s. 3. The learned judge left it to the jury whether this was in fact a fraudulent deed, and made in contemplation of bankruptcy; and they have found that it was not. [*Alderson*, B.—The question is, whether *per se* it is an act of bankruptcy.] The case of *Baxter v. Pritchard* (e) is an authority to shew that an assignment by a trader of his whole stock in trade is not an act of bankruptcy, when the purchaser gives a fair price for the goods. [*Parke*, B.—There the trader got a sum of money which was a full equivalent for the property transferred, and with which he might have purchased other goods. Is not *Newton v. Chantler* decisive of this question?] The ruling in that case has been a good deal doubted. It appeared in this case that the assignment was made for a temporary purpose only. [*Parke*, B.—Whether it was made for a temporary purpose or not, it is a conveyance of all his effects, and he parts with all his interest in them. Suppose there was a secret trust that they should be re-conveyed, yet all is conveyed away in the mean time; but there is nothing in the report to shew that it was to be temporary.] It was a question for the jury, whether the deed was fraudulent, or made with intent to defraud

(a) 1 C. M. & R. 777.

(d) 7 East, 138.

(b) Ibid. 782.

(e) 1 Ad. & Ellis, 457; 3 Nev. &

(c) 1 Ad. & Ellis, 77; 3 Nev. & Man. 638.
Man. 383.

his creditors. *Gibbins v. Phillips* (a). [Lord Abinger, C. B.—The question is, whether an assignment by a trader of all his effects to one of his creditors is not necessarily a fraud on the others.] It has not been shewn that this deed necessarily prevented the bankrupt from carrying on his trade, inasmuch as it could not operate upon the partnership effects.

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Blackburn, and *Hoggins*, *contra*, were stopped by the Court.

LORD ABINGER, C. B.—I think there ought to be a new trial in this case. If it had been distinctly shewn that the assignment was given for a temporary purpose, and merely by way of substitution until another deed could be prepared and executed, there might be some room for the argument raised on that point; but that was not established. If a man assigns the whole of his effects, not for a new consideration, but for an outstanding debt, that is an act of bankruptcy; because the very nature of the transaction prevents him from carrying on his trade. Some doubt might have arisen had the case rested on the 3rd section of the Bankrupt Act alone; because, by that section, any fraudulent gift, delivery, or transfer by a trader of any of his goods or chattels, is made an act of bankruptcy. It might be said that the word “fraudulent” in that section applied to some fraud in fact, and therefore, that the deed would not be void unless there was some fraud in the circumstances attending its execution. But the succeeding section, the 4th, explains the meaning of the provision in the 3rd section. It had always been understood that a conveyance of all a trader’s effects constituted it an act of bankruptcy. There the Legislature intended that the law should remain so; but that, if certain pro-

(a) 7 B. & C. 529.

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ceedings were adopted, the deed should, in particular cases, be valid. The jury ought to have been told in this case that the deed was fraudulent in its very nature, and therefore there must be a new trial.

PARKE, B.—I take it to be perfectly well settled, that, where a trader makes an assignment of all his effects, or of all except a very small portion, it is necessarily an act of bankruptcy without any actual fraud. *Worseley v. De Mattos* (a), *Wilson v. Day* (b), where there was a total absence of fraud; and, lastly, in the case of *Newton v. Chantler* (c), where the deed was executed by the party whilst he was under process of compulsion. In all those cases it was decided that an assignment by a trader of all, or of the principal part of his effects, without any fraud in fact, is an act of bankruptcy. It seems to me, that, on the evidence as it stands, the bankrupt did not possess any effects not included in the assignment; and if not, then the assignment was in itself an act of bankruptcy; but, if he did possess other effects, that will appear on another trial.

BOLLAND, B.—I am of the same opinion. In *Hassells v. Simpson* (d), Lord Mansfield laid it down that such a deed as this was an act of bankruptcy. Lord Mansfield says—“It has been settled over and over, that, if a trader makes a conveyance of *all* his property, *that* is instantly an act of bankruptcy.” There it was never pretended that there was any fraud, and the simple question was, whether the deed taken *per se* was an act of bankruptcy. He does not say that there was any question for the jury; he says “it is fraudulent;” and the reason that he gives is, that “it destroys the capacity of trading.” He goes

(a) 1 Burr. 467.

(b) 2 Burr. 827.

(c) 7 East, 138.

(d) 1 Douglas, 92.

on to add—"In this case *Jackson*," that is the bankrupt, "could not sell an ounce of property after the assignment. The whole belonged to another man. It was a fraud in *Jackson* to deal with any body as a trader." Now, it appears to me that this deed was an instrument of this description, for it purports to convey all the effects of the bankrupt, and it does not appear that he had any other effects that did not pass by it.

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ALDERSON, B.—I am of the same opinion. I always understood that a conveyance of *all* a trader's effects was an act of bankruptcy of itself, and that a conveyance of any part of them was an act of bankruptcy, if it were fraudulently made. Then there is a class of cases which have been referred to by Mr. *Milner*, where there is a sale or transfer of goods for a full consideration. If an equivalent is given, there is only a change of the nature of the property which the party has, but not a conveying away of it. He still retains as much property as he did before. If a trader, in a small way of business, were to convey away the last packet of goods, so that he had no property in his shop to carry on his trade with, it would be an act of bankruptcy. The 4th section of the Bankrupt Act explains the meaning of the words of the previous clause; because it says, that, if questioned within six months after its execution, a deed of assignment for the benefit of his creditors shall be still an act of bankruptcy. And the act also requires that certain notices shall be given, so that all the creditors of the bankrupt may know of its execution; and for this simple purpose, to give them the power of choosing new trustees, different from those whom the bankrupt may have appointed, by taking out a commission against him. There ought, therefore, to be a new trial, because the question of fraud ought never to have been left to the jury.

Rule absolute.

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REX *v.* The Sheriff of ESSEX, in FITCH *v.* COURTENAY.

Where a plaintiff rules the sheriff in vacation to return the writ, or bring in the body, with the view of proceeding against the sheriff in the next term, he will not be entitled against the sheriff to any damages which may accrue intermediately between the default and the attachment, unless he give the sheriff notice of his intention to proceed against him, when the irregularity is first discovered.

The costs of such notice will be included in the costs of the attachment.

ON the 12th *June*, the last day of *Trinity* Term, 1835, the plaintiff arrested the defendant for goods sold. The defendant gave bail to the sheriff, but did not put in special bail in due time. On the 20th *June* the plaintiff declared *de bene esse*, and laid his venue in *Essex*. On the 23rd *June* (in vacation) the sheriff was ruled to return the writ. On the 25th *June* the defendant gave notice of special bail, but did not give notice of justification; and on the same day he pleaded *nunquam indebitatus*, but the plea was returned. On the 30th *June*, in the morning, the plaintiff's attorney searched at the office for the sheriff's return, and no return having been filed, "pursuant to the Baron's order," on the 3rd *November*, the first day of *Michaelmas* Term, an attachment was granted, upon the motion of *Jervis*, against the Sheriff of *Essex*, for not returning the writ.

Subsequently, *Platt* obtained a rule to set aside the attachment, upon the ground that the return had been prepared on the 29th *June*, but had not been filed, through mistake, until half-past eleven on the following day.

In answer to this the plaintiff's attorney swore that the defendant had died on the 6th *September*, and that, if the bail had been perfected in due time, he should have been able to have proceeded to trial at the *Essex* Assizes, on the 30th *July*.

After argument, the Court ordered the attachment to be set aside, on payment of costs, and of such further damages, if any, as the Master might find the plaintiff to have sustained by reason of the sheriff's omission to return the writ before the 30th *June*.

The Master made his report, and found that the plaintiff had sustained no further damages by the sheriff's de-

fault. He founded this report upon a statement of the defendant's poverty, which rendered it improbable that the plaintiff would have got any fruits of his judgment, and also upon the course which the plaintiff's attorney had pursued; but he also found that the proceedings were regular, and the debt due.

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Jervis objected to the report, and moved to refer to the Master the mere question of amount; contending, that, as the plaintiff had lost a trial, and the opportunity of proceeding, by the defendant's death, in consequence of the sheriff's default, the sheriff ought to pay the amount of the debt.

Platt supported the report.

ALDERSON, B.—It seems to me that we ought to assimilate, as far as possible, the practice in vacation, to that which prevailed in term before the rule 1 *M. T. 3 Will. 4*, and that in so doing we shall effect the purposes for which the rule was made. In term the sheriff has notice of the plaintiff's intention to proceed against him by the rule for the attachment, and, in vacation, if the plaintiff means to make the sheriff liable for intermediate damages, in consequence of his default, he should give the sheriff notice to that effect, and then should receive such damages as may occur between that notice and the notice which the sheriff must give when the defect has been cured. The expense of the notice to the sheriff will be part of the costs of the attachment obtained against the sheriff in the next term, and this course will avoid such questions as that now raised.

PARKE, B.—I agree with my brother *Alderson*, that a sheriff ought not to be called upon to pay damages for an irregularity, unless the plaintiff, so soon as he discovers

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the irregularity, give the sheriff notice that he intends to proceed against him. The sheriff will pay the costs of such notice.

ABINGER, C. B.—I see no reason for disturbing the report.

Report confirmed, without costs.

WATKINS v. O'GORMAN MAHON.

After a defendant had been arrested for 200*l.* by an attorney, he applied to have the plaintiff's bill taxed, which was ordered, upon the terms of the plaintiff being at liberty to sign judgment for the amount taxed, and the defendant undertaking to pay that amount and the costs of the action; the Master allowed upon taxation 149*l.* only, but disallowed 60*l.* actually expended by the plaintiff in preparing briefs, &c. in great haste by the defendant's direction, upon which extra charges were made by the copyists:—*Held, first*, that the plaintiff had a probable cause for the arrest; and, *secondly*, that the defendant was estopped by the terms of the order from complaining of the arrest.

ASSUMPSIT for an attorney's bill. The bill amounted to 487*l.* 19*s.* 2*d.*, and credit was given for 232*l.* 10*s.* paid, leaving a balance of 225*l.* 9*s.* 2*d.* The plaintiff arrested the defendant for 200*l.* After plea pleaded and notice of trial given, the defendant took out a summons to tax the plaintiff's bill, when *Patteson, J.*, made the following order:—"Upon hearing the attornies or agents on both sides, and by consent, I do order that the plaintiff be at liberty to sign final judgment immediately, and that the plaintiff's bills of costs, on account whereof this action is brought, be referred to the Master to be taxed; that the plaintiff give credit on such taxation for all sums of money by him received from and on account of the said defendant; and that, upon payment of what (if any thing) may, on such taxation, appear due, together with the costs of this action to be also taxed and paid, all further proceedings herein be staid. And I do further order, that, in default of payment, the plaintiff be at liberty to issue execution in four days after the Master's allocatur for the amount specified in such allocatur." Upon this order the Master taxed the bills, and deducted therefrom 106*l.* 16*s.* 8*d.*, which, with the credits, reduced the

probable cause for the arrest; and, *secondly*, that the defendant was estopped by the terms of the order from complaining of the arrest.

balance due to the plaintiff to 149*l.* 0*s.* 7*d.* The Master allowed the plaintiff the costs of the taxation. *Exch. of Pleas, 1836.*

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In *Easter* Term, *Maule*, for the defendant, obtained a rule to shew cause why so much of the order as respected the costs of the action should not be discharged; and why the plaintiff's costs of taxation of his bills of costs, allowed him as costs in the cause, should not be disallowed; and why the defendant should not be allowed his costs of the taxation and of the action.

Jervis shewed cause.—The order was made by consent, and cannot therefore be varied. The defendant is not entitled to the costs of taxation, because the stat. 2 *Geo.* 2, c. 23, s. 23, which gives costs where one-sixth is taken off an attorney's bill on taxation, does not apply where the client applies for a taxation of the bill after action brought. *Benton v. Bullard* (a), *Jay v. Coaks* (b), *Harbin v. Miles* (c).

The defendant is not entitled to the costs of the action under the statute 43 *Geo.* 3, c. 46, s. 3. By the terms of the order he consented to pay the costs of the action, and it is fitting he should do so; because, within one month after the delivery of the bill, he might have had the bill taxed without putting the plaintiff to the expense of the suit. But the statute does not apply, unless there be a recovery, *Rowe v. Rhodes* (d), which must mean a recovery by verdict. *Holder v. Raitt* (e). It may be said, however, that the Court can make this order by its summary authority over an attorney of the Court. In *Robinson v. Elsam* (f), which may be cited as an authority, two of the Judges thought the case fell within the stat. 43 *Geo.* 3, c. 46, s. 3, and one decided upon the summary jurisdiction

(a) 4 Bing. 561.

(b) 8 B. & C. 635; 3 M. & Ry. 35.

(c) 9 B. & C. 755.

(d) 2 C. & M. 379.

(e) 2 Ad. & Ell. 445; 4 Nev. & Man. 466.

(f) 5 B. & Ald. 661.

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of the Court over attornies. The former ground has been shaken by the case of *Rowe v. Rhodes*, and the latter has been distinctly overruled in *Dagley v. Kentish* (a).

Independently of these points, however, the defendant shews by his affidavit that he had a reasonable cause for arresting the plaintiff for the full amount.

Maule objected to the plaintiff's affidavit, and contended that it contained many disclosures which were communicated to the plaintiff confidentially as an attorney, and therefore could not be read. [*Alderson*, B.—The privilege cannot extend to disputes between the attorney and client. *Parke*, B.—The plaintiff must read such parts only of the affidavit as are necessary to rebut the charge of arresting the defendant without reasonable or probable cause].

Jervis.—The affidavits shew that about 60*l.*, the excess complained of, was incurred in preparing and copying briefs at a short notice by the defendant's direction, and for which extra charges were made by the stationers. The Master of the Crown Office has disallowed this item, but the plaintiff had probable cause for believing it would be allowed.

Maule, contra.—The merits of the affidavits have already been decided by the Master, who has heard every thing that could be urged in support of the charges in the bill, and has determined that the defendant is not liable beyond the amount allowed.

The statute does not say that the recovery must be by verdict, and the debt is recovered when the proceedings in the action are at an end, and the money is paid under the decision of the Master. *Robinson v. Elsam* is an ex-

(a) 2 B. & Adol. 411.

press authority that in such a case the statute does apply. It likewise establishes the summary jurisdiction of the Court over attornies in cases like the present; and although, in *Dagley v. Kentish*, the Court, in consequence of a doubt, refused, after action brought, to order an attorney's bill to be taxed, which contained no taxable item; in *Watson v. Postan*(a), which is a later decision, this Court ordered an attorney's bill to be taxed, under the jurisdiction which it has at common law. The other parts of the rule were not relied upon.

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LORD ABINGER, C. B.—We are not called upon to decide the points which have been raised, for this case can be decided upon its merits. The Master has disallowed a portion of what the plaintiff has actually expended, and though the Master may be right, and the plaintiff mistaken in his notion as to the prudence of that expenditure, we cannot say that the plaintiff had not reasonable cause for expecting that the money actually expended by him would be allowed. The amount so disallowed is sufficient to make up the difference between the sum found to be due and that for which the defendant was arrested.

PARKE, B.—Under the circumstances, I think the plaintiff had a reasonable and probable cause for arresting the defendant for 200*l*. If he had not, I should hesitate before I disturbed the arrangement entered into between the parties. The reference to the Master was by consent, and it was upon condition that the plaintiff should sign judgment, and that the defendant should pay the costs of the action. If the defendant complained of the arrest, he ought before the order was made to have taken his stand, and required that provision should be made upon that subject.

(a) 2 C. & J. 370.

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ALDERSON, B.—The defendant should have made it a term of the reference, that he should be permitted to complain of the arrest, should the facts warrant him in so doing. The plaintiff might then have exercised his judgment, whether he would consent to the taxation of the bill upon such terms.

Rule discharged.

—◆—
REX *v.* BULLOCK and Others.

The condition of a recognizance to pay the seizing officer the costs occasioned by a claim, is broken by the non-payment to the seizing officer of the general costs of resisting the claim, though such costs are not incurred personally by the seizing officer.

DECLARATION in *scire facias* on a recognizance of bail in 100*l.* The defendants cravedoyer of the writ and recognizances, and of the condition, which, after reciting that *E. D.*, *W. S.*, and *J. P.*, officers of his Majesty's customs, had lately seized as forfeited to the use of his Majesty and themselves, the smack or sloop *Bien Aimé*, with her tackle, &c., the property whereof was claimed by *A. Schiers* and *A. Gosselin*, (two of the defendants), who had entered their claim in the Court of *Exchequer*, was for payment of the costs which should be occasioned by such claim, in case the vessel should be adjudged forfeited. They then pleaded that the said *E. D.*, *W. S.*, and *J. P.*, did not prosecute the said claim, and that no costs were incurred by or occasioned to them by reason of the said seizure. The replication alleged, that, after the making of the recognizance, and before the suing out the writ of *scire facias*, to wit, on &c., the said smack or sloop was duly adjudged forfeited, and that a large amount of costs was occasioned by the said claim, which was taxed by the Remembrancer at the sum of 146*l.* 5*s.* 6*d.*, which sum had not been paid to the said *E. D.*, *W. S.*, and *J. P.*, or either of them, but was still in arrear and unpaid. To this replication the defendants demurred, and the Attorney-General joined in demurrer.

Jervis, in support of the demurrer.—The object of the recognizance is to protect the seizing officers only. This clearly appears from the preamble of the stat. 8 Ann. c. 7. s. 63, “for preventing the great charges that the officers of the customs seizing goods prohibited and uncustomed are put to, by groundless and vexatious claims entered thereto in the Court where such goods are prosecuted.” This was followed by subsequent statutes, 15 Geo. 2, c. 31, s. 7; 3 Geo. 3, c. 22. s. 8; 24 Geo. 3, c. 47, s. 37, which increased the amount of the penalty ultimately to 100*l.*, but left the object of the original law untouched. By 6 Geo. 4, c. 108, s. 91, the security is to be taken generally to pay the costs incurred by the claim, and this is re-enacted in terms by the late act, 3 & 4 Will. 4, c. 53, s. 101. To neither of these is there any preamble, but they follow out the principle of the first act, and must be taken to require the recognizance as a security for the seizing officers. The costs incurred by the Attorney-General may be recovered in another mode, *Rex v. Munn* (a); but it is not alleged that the seizing officers have incurred any costs: in fact, the contrary is admitted; and therefore the recognizance cannot be put in suit.

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Barlow, contra, was stopped by the Court.

PER CURIAM.—The condition of the recognizance is to pay to the persons named all such costs as should be occasioned by the claim; and the replication, which shews that costs were occasioned by the claim which have not been paid, shews a breach of the condition in its very terms. It is perfectly immaterial for whose benefit the recognizance was entered into, for the King sues for the

(a) *arker*, 91.

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penalty, and the defendants must shew that the condition has been performed.

Judgment for the Crown.

STUBBS v. LAINSON and Another.

In an action on the case for a false return, the declaration alleged that the defendant *seized and took in execution* divers goods and chattels of the value of the monies directed to be levied as aforesaid, and *then levied* the same thereout. The defendant pleaded that he did not seize or take in execution any goods or monies, and levy the monies directed by the said writ to be levied, *modo et forma*:—*Held*, that the plea was bad, as the issue tendered was too large.

CASE against the Sheriffs of *London* for a false return.—

The declaration stated that the plaintiff theretofore, to wit, on &c., in the Court of our Lord the King, of the bench at *Westminster*, before &c., by the consideration and judgment of the same Court, recovered against one *George Allen*, 16*l.* 11*s.*, which were adjudged to the plaintiff in and by the said Court for his damages by him sustained, as well on the occasion of the not performing certain promises, &c., as for his costs, &c. The declaration then averred the delivery of the writ of *fi. fa.* to the sheriffs to be executed, and then alleged, that, by virtue thereof, the defendants, so being sheriffs of the said city of *London*, afterwards, to wit, on &c., and within their bailiwick as such sheriffs, *seized and took* in execution divers goods and chattels of the said *George Allen*, of great value, to wit, of the value of the monies so indorsed, and directed to be levied as aforesaid, and *then levied the same* thereout. Yet the defendants had not the said monies, or any part thereof, before the said justices, &c., according to the exigency of the writ, &c.; and that the now defendants, after the said levy, to wit, on &c., falsely and deceitfully returned that the said *George Allen* had not any goods or chattels in their bailiwick, whereof &c.

The defendants pleaded that they did not, by virtue of the said writ in the said first count of the said declaration mentioned, *seize or take* in execution any goods or monies of the said *George Allen*, and *levy the monies* so indorsed and directed to be levied by the said writ in the said

declaration mentioned, or any part thereof, *modo et forma*; concluding to the country.

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Demurrer, assigning for causes, that the traverse in the plea, that they, the defendants, did not by virtue of the said writ, seize or take in execution any goods and chattels of the said *George Allen*, and levy the monies so indorsed and directed to be levied, or any part thereof, is too large and extensive, and tends to raise an immaterial issue, and is insufficient in this, to wit, that such matter is denied in the conjunctive, instead of being denied in the disjunctive, viz. that the defendants did not seize or take in execution, any goods and chattels of the said *G. Allen*, or levy the monies so indorsed, and directed to be levied, or any part thereof. And the defendants have thereby attempted to compel the plaintiff to adduce more extensive evidence than by law ought to be and would be required to support the said *first* count if the same were properly traversed, inasmuch as either the taking and seizing the goods of the said *G. Allen* by the defendant, or levying the monies so indorsed and directed to be levied, or any part thereof, would be sufficient to support the said action of the plaintiff.

Joinder in demurrer.

The points stated for argument on the part of the plaintiff were, that the *second* plea was bad, because it traversed an allegation in the conjunctive which might have been supported by proof in the disjunctive; the effect of the traverse being to impose on the plaintiff more extensive proof than is by law essential to the support of his case.

Miller, in support of the demurrer.—The ground of demurrer is, that the plea tenders too large an issue. It is incumbent upon the plaintiff, under the issue tendered by the defendant, to prove not only the seizing and taking of the goods, but also that the sheriff levied the

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execution, which would not otherwise have been necessary, because the sheriff is responsible for a false return, if he seizes only. [Lord *Abinger*, C. B.—You contend, that, if he had pleaded the general issue, you would not have been bound to prove that he levied, but only that he had seized the goods]. The rule is correctly stated by the counsel, in arguing in support of the demurrer in *Moore v. Boulcott* (a), that “in actions for damages, where the plaintiff is entitled to recover, although his proof should not substantiate his whole demand, a traverse which seeks to bind him to the proof of his entire demand is immaterial and bad.”

James, in support of the plea.—The plaintiff would have been bound to prove both that the sheriff had seized and that he had levied; because those facts make up the one allegation of the defendants’ having executed the writ of *fi. fa.* Wherever several facts constitute one proposition, the defendant, by his plea, may put the plaintiff upon proof of all the facts. *Robinson v. Raley* (b); *O’Brien v. Saxon* (c). The plaintiff would be bound to prove more than a mere seizure; he must prove that the sheriff has seized the goods, and converted them into money.

LORD ABINGER, C. B.—The sheriff would be liable if he seized, whether he sold or not. The plea raises too large an issue. The defendants, by the issue tendered, would render it incumbent upon the plaintiff to prove that the goods were seized, and the money levied out of them, which it is not incumbent upon him to do.

Judgment for the plaintiff, with liberty to the defendants to amend.

(a) 1 Bing. N. C. 324; 1 Scott. 122.

(b) 1 Burr. 316.

(c) 2 B. & C. 908.

GRIFFITHS v. JONES.

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CASE for an injury to the plaintiff's reversion in a wall. Pleas—Not guilty, and several special pleas; amongst others, one claiming a right to a drain under the wall, and justifying the breaking of the wall to clean the drain. The plaintiff traversed the right. The record was taken down for trial at the *Summer Assizes*, for the county of *Merioneth*, in the year 1834, and was entered; but an order to amend was refused by *Vaughan, J.*, and the record was withdrawn. Subsequently, an order was obtained by the plaintiff from *Patteson, J.*, to amend the replication and pleadings by striking out the traverse of the right, and new assigning excess on payment of the costs of the amendment and the costs of the day, the defendant being at liberty to withdraw the second and fourth pleas, which put in issue the plaintiff's interest in the premises, and the injury sustained. In pursuance of this order, the plaintiff newly assigned the excess, to which the defendant pleaded not guilty, and the plaintiff gave notice of trial, whereupon the defendant, by Judge's order, withdrew his plea of not guilty to the new assignment, and so much of the plea as applied to that part of the declaration, and paid into Court 10*l.* in satisfaction of the damages under the new assignment. The plaintiff took this sum out of Court "in satisfaction of the damages for which the action was brought." The Master, on the taxation of costs, gave to the plaintiff the costs of the writ; to the defendant the costs after the writ up to the new assignment; and to the plaintiff the costs incurred subsequently to the new assignment. *Jervis*, having obtained a rule to shew cause why the Master should not review his taxation, on the ground that the plaintiff, having succeeded, was entitled to the general costs of the cause;

In case the defendant pleaded the general issue, and justified under a right, which the plaintiff traversed. The plaintiff afterwards obtained an order to amend, upon payment of costs, and withdrew the traverse, and new assigned excess; the defendant confessed the new assignment, and withdrawing so much of the general issue as applied to that part of the declaration new assigned, and paid into Court 10*l.*, which the plaintiff took out. The Master allowed the plaintiff the costs of the writ, and of the new assignment and subsequent proceedings, but gave the defendant the other costs, and the general costs of the cause:—*Held*, that the Master was right.

Quære, whether the plaintiff was not entitled to some portion of the declaration, if it could be ascertained.

Sir W. W. Follett shewed cause.—The Master was

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right in his taxation. If the plaintiff had not amended, the defendant would have succeeded, as he had pleaded a justification to the whole. According to the practice under the old form, where there was a new assignment and the defendant suffered judgment by default on the new assignment; if he succeeded on the right in dispute, he obtained the general costs of the cause (a). [*Alderson, B.*—That is because there he succeeds on the trial]. Here instead of suffering judgment by default, the defendant pays money into Court, which the plaintiff admits is sufficient to cover all the damage sustained. The Master finds that there was a cause of action to the extent of the money paid into Court on the new assignment, and allows the plaintiff her costs accordingly. It is the same as if the defendant had suffered judgment by default to the new assignment, in which case the defendant would be entitled to the general costs of the cause. He cited *Ruddock v. Smith* (b), and *Cross v. Johnson* (c), and also referred to *Booth v. Ibbotson* (d).

Jervis, in support of the rule.—The defendant by the Judge's order has the costs of the day, and the pleadings rendered unnecessary by her not having newly assigned in the first instance; and therefore it may be considered as if the new assignment had been originally put upon the record. The plaintiff is then entitled to the general costs, because the defendant is wrong by his own admission. It is true, that, by accepting the sum paid into Court, the plaintiff admits that the pleas cannot be denied, but that is the defendant's error, for the new assignment only points out that the defendant has mistaken the plaintiff's complaint. It is in fact but a re-statement of it more specifically, after by the pleas, it is clear, that the defen-

(a) 1 Wms. Saunders, 300 f, n.

(b) 1 Dowl. Pr. Cases, 467.

(c) 9 B. & Cr. 613.

(d) 1 Y. & J. 354.

dant does not understand the plaintiff's case. If the defendant had not withdrawn so much of the not guilty as applied to the declaration covered by the new assignment, the plaintiff would have been entitled, after verdict, to the general costs of the cause. He would have been so entitled, only because he was forced to trial by the form of the pleadings ; and, as the plaintiff has succeeded upon what in fact is the only cause of her complaint, she should have the whole costs ; at all events, there is one part of the declaration, of which the new assignment is only a repetition, and for that the plaintiff is entitled to costs.

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LORD ABINGER, C. B.—The point to be considered is, whether the payment of money into Court, and the taking of it out by the plaintiff in satisfaction of the damages sustained, is not equivalent to a judgment by default to the new assignment. If so, then the defendant is entitled, as he has succeeded on all except as to the 10%, to the general costs, and the plaintiff to the costs of the writ and the new assignment.

ALDERSON, B.—Try it by this test ; taking the new assignment to be part of the declaration, the plaintiff has been allowed her costs as to the latter part of it. She is entitled to the costs of the writ, because she has succeeded in the action, and to all the costs occasioned by the new assignment. As to the residue, the defendant successfully pleads and succeeds, and is entitled to the costs. Strictly speaking, perhaps, the plaintiff ought to have been allowed some part of the costs of the declaration, but practically there would have been great difficulty in settling them.

Rule discharged.

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ROSE and Others v. EDWARDS.

A., a dealer in china, being insolvent, assigned his business and his stock in trade to his brother *B.*, who was a carver and gilder, and entered into a composition with his creditors to pay them 5*s.* in the pound; his brother *B.* undertaking to pay 2*s.* 6*d.* in the pound, and he himself the remainder. *A.* continued to manage the business in the shop for his brother, *B.*'s wife occasionally going there, and *B.*'s name appearing over the door. One of *A.*'s creditors applied to him at that shop, and pressed for payment of his share of the composition. *A.* offered a bill of exchange in payment, on which the brother's name had been put, but without his authority, as indorser, and as

the amount exceeded the amount due for the composition, *A.*, and *B.*'s wife, who was then in the shop, proposed that goods should be supplied to the shop for the amount of the balance, which was agreed to, and goods were accordingly sent to the amount of the balance. The bill having been dishonoured, *B.* was sued, and pleaded that he never indorsed the bill, and that no notice of dishonour had been given to him; and the jury found both those issues in his favour. Evidence was given that *B.* had held himself out as responsible for all orders given at that shop. The jury found that *A.* had a general authority to buy goods for *B.*, and that the plaintiff did not sell the goods on the credit of the bill alone, but on the credit of *B.*:—*Held*, that the value of the goods sent was recoverable on a count for goods sold and delivered, in the action against *B.*

DECLARATION on a bill of exchange, drawn by one *J. B. Davies* upon *J. Moore* for 25*l.*, payable four months after date to the order of the drawer, accepted by *J. Moore*, and indorsed by the drawer to the defendant, and by him indorsed to the plaintiffs. The declaration also contained counts for goods sold and delivered, and on an account stated. The defendant pleaded to the first count, *first*, that he did not indorse the bill to the plaintiffs; *secondly*, that he had not due notice of dishonour. To the rest of the declaration he pleaded *non assumpsit*.

At the trial before Lord Abinger, C. B., at the *Middlesex* Sittings after last *Easter* Term, it appeared that the plaintiffs were china manufacturers in the *Potteries*, carrying on business in *London* through an agent; and the defendant, *John Edwards*, was a carver and gilder, living at No. 17, *Shepherd's Market, Oxford Street*. It appeared that his brother, *William Edwards*, formerly kept a china shop at No. 7 in that place, but had become insolvent. His creditors agreed to take a composition of 5*s.* in the pound, 2*s.* 6*d.* to be paid by the defendant, and 2*s.* 6*d.* by himself; and the business was assigned to the defendant, who continued to carry it on; *William* and his wife, as well as his the defendant's wife, appearing in the shop, and managing the business there. The defendant paid the composition which he had agreed to do, but his brother *William* did not. At the time of his becoming insolvent,

William was indebted to the plaintiffs in the sum of 87*l.*, and the amount of his composition thereon was about 11*l.* *William* being pressed by the plaintiffs' agent to pay that sum, produced the bill in question, and offered to give it in payment of the amount, and directed that goods should be supplied to the shop to the amount of the balance; the defendant's wife joining in that order. The plaintiffs agreed to this, and sent in goods to the amount of 14*l.* 0*s.* 8*d.* At the time when the bill was produced, and the order given for the goods, the defendant's name was upon the bill as indorser; but it was proved on the trial not to have been in his handwriting, and not to have been written by his authority. It appeared that the defendant's name was over the door; and on an application, by another party, respecting the person responsible for goods supplied to the shop, the defendant said he was answerable for all orders given at that shop; and it was proved that orders given by persons in that shop, and acted upon, had been subsequently paid for by the defendant. Notice of dishonour was not proved. At the trial the plaintiffs contended, that, though they might not be entitled to recover the whole amount of the bill, they were at all events entitled to recover to the amount of the goods supplied at the shop. The defendant insisted that the plaintiffs had taken the bill in payment of those goods, and, by not giving due notice of dishonour, had made it their own, and thus their demand was satisfied. It was also contended, on the part of the defendant, that he was not liable for the goods furnished upon this order. On the part of the plaintiffs, it was urged in reply, that, if this was a payment, it ought to have been specially pleaded as such. The Lord Chief Baron was of that opinion, but considered the facts admissible in evidence in mitigation of damages, and therefore he directed the jury, if they thought *William* had a general authority to buy goods for the defendant, to find a verdict for the plaintiffs on the *second*

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count, with nominal damages, giving the plaintiffs leave to move to enter a verdict for the sum of 14*l.* 0*s.* 8*d.*, and the defendant leave to move to enter a verdict for him generally. The jury having found a verdict for the plaintiffs on the second count, cross rules were accordingly obtained, on a former day in this term, pursuant to the leave reserved.

Kelly and R. V. Richards, for the plaintiffs.—*First*, this was a sale and delivery of goods, for which an action for goods sold and delivered is maintainable. The jury have found that there was an authority to order the goods, and that they were accordingly sent to the defendant's shop. It is therefore clear that the goods were delivered. It may be that they were supplied on the credit of this bill; but if no bill had been given, or if it turned out to be a forged indorsement, or if the bill were dishonoured, the defendant would still be liable for goods sold and delivered. This is the case of a person, who, though he does not carry on the business himself, holds himself out to the world as the proprietor and owner of the shop, and allows his brother and his wife to carry on the business for him: he thereby holds himself out as the person responsible for contracts made by them. Then, if the brother and the wife had authority to contract for these goods, had they not authority to contract for payment in this way? If the goods had been previously bought, there cannot be a doubt that *William* had a right to have paid for them with money out of the till, or to have paid for them by a bill of exchange. If the brother and wife had authority to contract for the goods, they had a right to contract for them to be paid for by bills; but, in truth, the goods were not sold for the bill: it was only retained by the plaintiffs as a security for the goods. [*Parke, B.*—When a party, who pays for goods by bill, does not put his name on the bill, it is strong evidence to shew that the goods were delivered in

exchange for the bill, the seller taking the risk of the bill upon himself. Lord *Eldon*, in *Ex parte Blackburne* (a), says—"I take it to be now clearly settled, that, if there is an antecedent debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that, if there is no antecedent debt, and *A.* carries a bill to *B.* to be discounted, and *B.* does not take *A.*'s name upon the bill, if it is dishonoured there is no demand, for there was no relation between the parties, except that transaction; and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill." In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill.] The present case falls within the first part of the proposition. The goods were accepted, and the plaintiffs take in exchange for them from the defendant's authorised agents a bill purporting to be indorsed by the defendant. [*Parke*, B.—If it had not been indorsed until after the goods were delivered it would have stood differently. Lord *Abinger*, C. B.—Do the plaintiffs mean to retain the bill for the amount due upon *William's* composition? They must take it for better or worse, or repudiate it altogether. It cannot be taken for one purpose, and repudiated for another].

Platt and *Miller*, *contrà*.—The brother and the wife had no authority to enter into a contract of this nature. It is clear that *William* had no express authority from *John* to enter into this contract, and there was nothing from which such an authority could be implied. An agency of the nature proved did not authorise them to contract for the payment of goods. But, even if they had authority to

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Cur. adv. vult.

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(b) 3 B. & Ald. 616.

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Exch of Pleas,
1836.

ROSE
v.
EDWARDS.

Rules accordingly.

Exch. of Pleas,
1836.

ROSE and Others v. EDWARDS.

A., a dealer in china, being insolvent, assigned his business and his stock in trade to his brother *B.*, who was a carver and gilder, and entered into a composition with his creditors to pay them 5*s.* in the pound; his brother *B.* undertaking to pay 2*s.* 6*d.* in the pound, and he himself the remainder. *A.* continued to manage the business in the shop for his brother, *B.*'s wife occasionally going there, and *B.*'s name appearing over the door. One of *A.*'s creditors applied to him at that shop, and pressed for payment of his share of the composition. *A.* offered a bill of exchange in payment, on which the brother's name had been put, but without his authority, as indorser, and as

DECLARATION on a bill of exchange, drawn by one *J. B. Davies* upon *J. Moore* for 25*l.*, payable four months after date to the order of the drawer, accepted by *J. Moore*, and indorsed by the drawer to the defendant, and by him indorsed to the plaintiffs. The declaration also contained counts for goods sold and delivered, and on an account stated. The defendant pleaded to the first count, *first*, that he did not indorse the bill to the plaintiffs; *secondly*, that he had not due notice of dishonour. To the rest of the declaration he pleaded *non assumpsit*.

At the trial before Lord *Abinger*, C. B., at the *Middlesex* Sitzings after last *Easter* Term, it appeared that the plaintiffs were china manufacturers in the *Potteries*, carrying on business in *London* through an agent; and the defendant, *John Edwards*, was a carver and gilder, living at No. 17, *Shepherd's Market, Oxford Street*. It appeared that his brother, *William Edwards*, formerly kept a china shop at No. 7 in that place, but had become insolvent. His creditors agreed to take a composition of 5*s.* in the pound, 2*s.* 6*d.* to be paid by the defendant, and 2*s.* 6*d.* by himself; and the business was assigned to the defendant, who continued to carry it on; *William* and his wife, as well as his the defendant's wife, appearing in the shop, and managing the business there. The defendant paid the composition which he had agreed to do, but his brother *William* did not. At the time of his becoming insolvent, the amount exceeded the amount due for the composition, *A.*, and *B.*'s wife, who was then in the shop, proposed that goods should be supplied to the shop for the amount of the balance, which was agreed to, and goods were accordingly sent to the amount of the balance. The bill having been dishonoured, *B.* was sued, and pleaded that he never indorsed the bill, and that no notice of dishonour had been given to him; and the jury found both those issues in his favour. Evidence was given that *B.* had held himself out as responsible for all orders given at that shop. The jury found that *A.* had a general authority to buy goods for *B.*, and that the plaintiff did not sell the goods on the credit of the bill alone, but on the credit of *B.*:—*Held*, that the value of the goods sent was recoverable on a count for goods sold and delivered, in the action against *B.*

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Exch of Pleas,
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ROSE
v.
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ROSE
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Rules accordingly.

Exch of Pleas,
1836.

ROSE
v.
EDWARDS.

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1836.

ARCHBOLD v. SMITH.

A common joinder in error to a special assignment of errors need not be signed by counsel.

It is not a ground of error *coram vobis*, that the writs of *venire facias*, and *distringas juratores*, are returned with only one panel annexed successively to both writs.

SPECIAL assignment of errors *coram vobis*, which was signed by counsel. Plea, the common joinder in error, "*in nullo est erratum*." The plea was not signed by counsel. The plaintiff in error treated the plea as a nullity, and signed judgment, after having given notice to the defendant that he should do so, unless the plea was signed by counsel.

Halcomb, in *Easter Term*, obtained a rule nisi to set aside the judgment for irregularity, with costs.

The *Attorney-General* shewed cause.—The assignment of errors being special, and signed by counsel, it was necessary that the joinder in error should be also signed by counsel. This case is not affected by the new rules. The rule of *Hilary Term*, 4 *Will.* 4, s. 4, applies only to joinders in demurrer; and, before the new rules, a joinder in demurrer required the signature of counsel, the object of which was, that the Court might have the security arising from counsel's responsibility. When the assignment of errors is common, and not signed by counsel, then the common joinder does not require counsel's signature (a). [*Parke, B.*—The effect of the common joinder is, that it admits the truth of the error assigned, but says it is *not* error]. In *Tidd's Forms*, the common joinder in error is signed by counsel, ("*Robert Stewart*"), which is a clear indication of his opinion that counsel's signature is necessary. [*Parke, B.*—Mr. *Tidd*, in page 1175, seems to be against you, for he there says, "the plea, or joinder in error, *if common*, need not be signed by counsel."] That, it is submitted, is only when the assignment

(a) Archbold's K. B. Pract. 257; Tidd's Practice, 1169.

of errors is the *common* assignment—here the assignment is *special*.

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v.
SMITH.

Halcomb, in support of his rule, was stopped by—

THE COURT, who said that the case must be decided by the practice of the Courts, which ought to be uniform; and as to which they would cause immediate inquiry to be made.

PARKE, B., shortly afterwards stated, that the Master of the *King's Bench*, and the Prothonotaries of the *Common Pleas*, had certified, that, according to the practice in those Courts, it was *not* necessary that the common joinder in error should be signed by counsel—therefore the judgment had been irregularly signed, and must be set aside with costs.

Rule absolute, with costs.

The judgment having been set aside, the case now came on for argument.

The assignment of error was as follows:—"That, although a writ of *venire facias juratores* was sued out in this action by and on behalf of the said *W. W. Smith*, to wit, on &c., and the same was then delivered to the Sheriff of *Middlesex* to be executed; and although a writ of *distringas juratores* was sued out in this action by and on behalf of the said *W. W. Smith*, to wit, on &c., and the same was then delivered to the said Sheriff of *Middlesex* to be executed; and although the said sheriff, in and upon the said writ of *venire facias juratores*, then made a certain indorsement in the words following, viz. the execution of this writ appears by the panel annexed; and also the said sheriff, upon the said writ of *distringas juratores*, then made a certain other indorsement in the words following, viz. the execution of this writ appears by the

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panel annexed; yet, in fact, there is but one panel, and there never has been more than one panel, and not two panels, one annexed to each of the said writs, as by law there ought to be; and therefore in this there is manifest error."

Sir W. Follett, for the plaintiff in error.—The only question is, whether, there being no panel annexed to the *distringas*, there is a sufficient return to that writ. It is not necessary to go into any old authorities upon the subject, for the point has been recently discussed at great length before the Court of *King's Bench*, in the case of *Rogers v. Smith* (a). That case is an authority, that, if there be no return, or no panel, then it is *error*. The 3 *Geo. 2*, c. 25, s. 8, shews that there must be a panel to the *distringas*; and in *Rogers v. Smith*, the Court decided that a panel was always necessary. There being two writs, the *venire facias juratores* and *distringas*, the sheriff has returned upon each, "*The return to this writ appears by the panel annexed;*" therefore there must be two panels. The two writs cannot be contemporaneous; for, *by the statute 42 Edw. 3*, c. 11, the *venire* must be returned before the trial at *Nisi Prius*, but the *distringas* cannot properly be returned till after the trial, it being returnable on the first day in bank. The 6 *Geo. 4*, c. 50, s. 15, has the same provision as is contained in the 3 *Geo. 2*, c. 25, s. 8, and both are statutory declarations of the ancient practice. This case must depend upon the practice; and the practice as to returning the jury process differs in country causes and town causes. [Lord *Abinger*, C. B.—In country causes the Court directs the *venire* to be returned to this Court, *unless* the Judge comes first, &c. and then the course is to return the *venire* at the Assizes, the same as in town causes. The *distringas* also. is returned at the

(a) 1 *Adol. & Ellis*, 772; 3 *Nev. & Man.* 760.

Assizes, and not to this Court]. *Rogers v. Smith* has decided that there must be a distinct return and panel to each writ. [Alderson, B.—In *Rogers v. Smith*, there was neither a return on the writ, nor a panel; here, the sheriff has returned both the writs, and annexed the same panel to both. You say there should be two panels; but why may not the sheriff annex the same panel to each writ successively, putting in the same pin twice?—there is one panel, which answers two purposes].

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1836.

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Halcomb, for the defendant in error, was stopped by the Court.

LORD ABINGER, C. B.—Both writs having been returned by the sheriff: the only question in this case is, whether it was necessary that he should have annexed two distinct panels, one to each writ, or whether he may not annex the same panel to both writs. Both writs are in fact returned by the sheriff at the same time, and the panel to the *distringas* must necessarily be verbatim the same as that to the *venire*. No possible prejudice can arise from the sheriff annexing the same panel to both writs, and we are therefore of opinion that he may do so.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Judgment for the defendant in error.

WARD v. PEEL.

IN this case the issue had been delivered, in the ordinary form, as of a cause to be tried before a Judge at *Nisi Prius*. Where an issue had been delivered in the usual form, as

for a trial at *Nisi Prius*, and the plaintiff subsequently obtained a Judge's order to have the cause tried before the sheriff; and this order, with notice of trial, having been served:—*Held*, on motion to set aside the issue, that it was irregular, as it ought to have been made up in the form of an issue to be tried before the sheriff, and that, it having been delivered before the Judge's order was obtained, the plaintiff ought to have taken out a summons to amend the issue.

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1836.

WARD
v.
PEEL.

Subsequently to that a Judge's order was obtained that the cause should be tried before the Sheriff. This order, with notice of trial, having been served on the defendant, *Petersdorff*, on a former day in this term, obtained a rule to shew cause why the issue, and the service of the order, and notice of trial, should not be set aside for irregularity.

Busby shewed cause — On reference to the 3 & 4 Will 4, c. 42. s. 17, it will not be found that there is any thing to prevent an issue being delivered, before a Judge's order is obtained that the cause shall be tried before the Sheriff. And where the issue is delivered before such an order is obtained, the only form that can be adopted at that time is the form applicable to a trial at *Nisi Prius*; and the obtaining of the Judge's order makes no difference. It is submitted, therefore, that the issue was regular. At all events the rule asks too much, for the service of the Judge's order was unobjectionable.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. It is plain from the act that the issue to be tried before the Sheriff ought to be made up in the form adapted to causes to be so tried. If the issue has been delivered before that order has been obtained, the party ought to take out a summons to amend the issue. In this case the party served a copy of the Judge's order that the cause should be tried before the Sheriff, but the service of that order was of no use.

The rest of the Court concurred.

Rule absolute.

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LIGHTFOOT v. KEANE.

DETINUE for certain title deeds. Plea—that one *John Lightfoot* was seised in fee of certain messuages, tenements, and premises to which those title deeds belonged, and, being so seised, in the year 1824, by his will, devised those estates unto *Joseph Spicer* and *James Keane*, upon certain trusts in the said will particularly mentioned, who took upon themselves the execution of the will, and became and were seised of the estates upon the trusts in the said will contained, and by virtue thereof entitled to the possession of the title deeds; and afterwards delivered them to and deposited and lodged them with the defendant, being the attorney and solicitor of the said *Joseph Spicer* and *James Keane*, for the affairs and businesses connected with and arising out of the trusts of the will, to be by the defendant used and referred to in the suits, affairs, and businesses in which the defendant was so employed as such attorney and solicitor, and for all other purposes connected with or arising out of the trusts of the will. That the said *Joseph Spicer* and *James Keane*, whilst the deeds continued in the possession of the defendant, became indebted to the defendant in the sum of 120*l.* for work and labour in different certain causes and suits, and for certain fees due and of right payable in respect thereof, which sum of money still remained unpaid; wherefore the defendant, having a lien upon the said deeds, detained them for his lien, as it was lawful for him to do.

Replication, that the trusts in the will were, that the trustees should receive the rents and profits, and pay and apply two-thirds of them towards the maintenance and education of the plaintiff, until he attained the age of twenty-one years, and, after he attained twenty-one, to pay them to him,

A. devised certain estates to trustees, upon trust to pay a part of the rents and profits to his widow, and the residue towards the maintenance and education of his son, until he reached twenty-one; and after that time to him, during the lifetime of the widow; and upon her death he devised the estates to his son in fee. The trustees having occasion to employ the defendant, an attorney, to defend certain causes and suits in carrying into effect the trusts of the devise, incurred a debt to him for certain costs and expenses, for which they deposited the title deeds with him as a security:—*Held*, that the defendant had no lien upon them against the son, after the decease of his mother, as the debt was the personal debt of the trustees.

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1836.

LIGHTFOOT

v.
KEANE.

and the remaining third part to his widow, for her life; and that, after her decease, the testator devised the estates to the plaintiff in fee. The replication then set forth certain executory devises over, upon which, however, nothing turned on the argument. It then averred that the widow died on the 30th of *April*, 1830, and that the plaintiff attained the age of twenty-one on the 24th of *February*, 1834, and requested the defendant to deliver up the deeds.

Demurrer, assigning for causes, that the plaintiff had not in any manner traversed or denied, or confessed and avoided the matters alleged in the plea; nor had the plaintiff denied that the defendant had such lien on the title deeds as the defendant had alleged; neither had he, in his replication, shewn that the lien of the defendant upon the deeds had been paid, satisfied, or otherwise discharged. Joinder in demurrer.

Channell, in support of the demurrer.—The plaintiff in his replication states no ground for defeating the defendant's lien on the deeds. The trustees were to take the estates upon certain trusts and for certain purposes, and employed the defendant in the management of those trusts. They thereby incurred a debt about the very affairs and business of the trusts, and that debt attaches itself to the estate, and becomes a charge upon it. The trustees were authorized to do every thing necessary for the benefit of the estate; and they acted as the agents of the party who is ultimately entitled to the estate, and therefore are entitled to throw the debt incurred by them upon that party.

W. H. Watson, contra, was stopped by the Court.

LORD ABINGER, C. B.—Whatever their powers were, this is the personal debt of the trustees. Could they

mortgage the estate? If they could not, how could they make a deposit of the title deeds, which is an equitable mortgage? There is no lien at all. Judgment must be for the plaintiff.

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1836.

LIGHTFOOT
v.
KEANE.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

NEALE v. MACKENZIE.

A WRIT of error having been brought on the judgment of the Court of *Exchequer* in this case (a), it was argued in last *Hilary* vacation by—

Bompas, Serjt., for the plaintiff.—Although the demurrer is to the rejoinder, the question turns on the form of the replication; and, in arguing upon it, the defendant has no right to rely on any fact alleged in the rejoinder. The plaintiff contends that the replication is good. No doubt, if the defendant had a right to distrain at all, the plaintiff cannot maintain trespass. Whether he had a right to distrain or not, depends on the question, whether the rent, under the circumstances disclosed in the plead-

A lessee of one hundred acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres, until half a year's rent became due, and excluded the lessee from the enjoyment

during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease:—*Held*, on error, (reversing the judgment of the Court of *Exchequer*), that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it.

(a) See the report of the case where the pleadings are fully set out in that Court, 2 C. M. & R. 84., out.

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1836.

NEALE
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ings, was apportionable or not. It is submitted that it was not, but that the contract of demise by the defendant to the plaintiff was altogether void; and that there has been an eviction, or an act done by the defendant of the same nature as an eviction, such as to prevent him from maintaining an action for the use and occupation of any part of the lands included in the demise. The argument for the defendant must go to this extent: that, if a man takes a house and park for twenty-one years, and afterwards finds that another party has possession of the park under a prior demise, he is bound to keep the house, paying a proportionable rent—that is, to keep and pay rent for a part which he would never have thought of taking by itself. Such a doctrine would be productive of great inconvenience. The authority of Lord Chief Baron *Gilbert*, in his *Treatise on Rents*, 178, is relied upon for the defendant, where it seems to be laid down, that only a disseisin, or tortious entry by the landlord, has the effect of suspending the whole rent. If that is to be taken strictly, the effect is, that a landlord may demise the same land fraudulently to two different persons, in such a manner as to deprive the second of the main part of the advantage he proposed to himself by taking it. It is submitted, that in this case, the prior lease to *Charlton* is in the nature of an eviction by the act of the defendant, and subject to the same rules of law as if it had been a direct eviction by the landlord: it is an entry into the land, under the authority of the lessor. There is certainly some looseness of expression in the authorities as to what constitutes an eviction, properly so called; its strict meaning seems to be a taking by title paramount to that both of the lessee and the lessor, but the more common understanding of the term applies to any case, where, by any act of the lessor, the lessee is deprived of his title to the land. [Lord *Denman*, C. J.—How can he be evicted from that which he never had? he must be evicted from his *possession*.] There are many dicta, shewing that the Judges have con-

sidered it as being in the nature of an eviction, where a party is continued in possession of land demised to another, who is thereby prevented from obtaining possession. In *Hayne v. Maltby* (a), which was an action on a covenant of the defendant, that, during the term of a patent, to which the plaintiffs asserted they had a right as assignees, for an engine to be fixed to a stocking-frame for making net, he, the defendant, would not use any other engine of this kind but one which the plaintiffs had covenanted that he should be permitted to use in a particular manner; it was held that the defendant was not estopped from shewing that the patent was void for want of novelty; and *Buller, J.*, there says—"It is now discovered that they [the plaintiffs] had no such right, and therefore the defendant has not the consideration for which he entered into this covenant, and notwithstanding which they insist that he is still bound. I think that the case of landlord and tenant is not unlike this; for the facts in this case are equivalent to an eviction of the tenant. As long as the tenant holds under the lease, he is estopped from denying his landlord's title: but when he is evicted, he has a right to shew that he does not enjoy that which was the consideration for his covenant to pay the rent, notwithstanding he has bound himself by the covenant." Now there the defence in substance was, that, by reason of the infirmity of the plaintiff's title, the defendant never took any interest—and yet it is assimilated to the case of an eviction. In *Tomlinson v. Day* (b), the defendant took a farm from the plaintiff, under an agreement that he should have the exclusive right of sporting, but it turned out that the plaintiff had no power of conferring the right of sporting: and an action for use and occupation being brought for the whole rent, the defendant paid into Court the annual value of the farm

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(a) 3 T. R. 138.

(b) 5 Moore, 558; 2 B & B. 681.

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only, and had a verdict, which, on argument, was sustained; and *Dallas*, C. J., says; "The plaintiff expressly engaged that the defendant should have the exclusive right of sporting; and as he had no right to grant it, it operated as an eviction of part of the subject matter of the demise." *Gardiner v. Williamson* (a) is still more strongly to the same effect. There, tithes and a homestead for collecting them were let by an instrument not under seal, at one rent; and it was held, that as it could not operate as a demise of the tithes, a distress for arrears of the whole rent was altogether unlawful. These authorities go to shew that either this was in the nature of an eviction, or that the landlord cannot recover or distrain for the fixed rent, if the demise be of distinct subject matters, and the lessee, from any cause, the failure of the demise or otherwise, can obtain possession only of a part. It has been said, the plaintiff may have an *interesse termini* in the eight acres; the dates, however, shew that that cannot be. The replication is dated in *December*, 1834; the demise to the plaintiff, stated in the plea, is for one year from *June*, 1833; the replication states that *Adam Charlton* is still in possession under the demise to him; that demise, therefore, must subsist longer than the demise to the plaintiff. But even if the plaintiff had an *interesse termini*, that would be totally different from that which he contracted for, namely, the actual possession of the land. [Lord *Denman*, C. J.—You say there is a distress in right of the whole of two subjects, and one of them only is demised. The question is, is the lessor, who does not demise the whole of that out of which the rent is to issue, at liberty to apportion the rent for himself?] If he seeks to recover on the possession of the other party, not by virtue of any deed, such possession is a condition precedent to his recovery. In

(a) 2 B. & Ad. 336.

Bac. Abr., Leases (N.), it is said without qualification, that, “if one makes a lease to A. for ten years, and the same day makes a parol lease to B. for ten years of the same lands, this second lease is *absolutely void*, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it.”

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The defendant may, perhaps, rely on the allegation in the rejoinder, that the plaintiff *had notice* that the eight acres were in *Charlton's* occupation. It has already been suggested that the defendant has no right to refer to the rejoinder: but even if he has, when had the plaintiff this notice? not before he entered, but only “at the time of his entry”—not until he found he could not enter, by reason of *Charlton's* occupation. He entered, intending, pursuant to his contract, to enter upon the whole. The contract, if it be void as against the plaintiff, cannot be set up in part, by his endeavouring to take advantage of the whole of it. That is no waiver of the objection to it, but the direct contrary. Then, there is nothing to shew any implied contract, out of which the right of distress could arise. The law of apportionment does not apply to this case. It is clearly established by the modern cases, that, if the lessee be evicted of part of the land, he may give up the whole, although he may *elect* to hold the other part; *Smith v. Raleigh* (a), *Stokes v. Cooper* (b). But it is a very different thing to permit the landlord, by whose

(a) 3 Camp. 513.

(b) *Ibid.*, note.

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default it is that the tenant cannot enjoy all that he contracted for, to say the rent shall be apportioned. If the eviction were by title paramount to the landlord, the case would have been different, because then the tenant would be dispossessed by no fault on the landlord's part; *Doe v. Meyler* (a). It has been sometimes considered that "title paramount" means a title paramount to that of the *tenant*; but that is an inaccurate interpretation; it means a title paramount and adverse to the landlord's. Here it is by the landlord's authority that the tenant has been kept out of possession: he has not performed the duty of protection he owed to his lessee. In *Reeve v. Bird* (b), *Parke, B.*, recognises the distinction between an eviction by a stranger, and by the landlord.

On the argument below, *Shepp. Touchst.* 275, was referred to as being adverse to the plaintiff; but it is rather in his favour; it accords entirely with the doctrine laid down in *Bac. Abr.*, and by Lord C. B. *Gilbert*. [*Patteson, J.*—What is there on this record to shew that the demise to the plaintiff was not under seal?] It must be so presumed until the contrary is shewn; it lies on the defendant to put that upon the record which shews that there was sufficient to pass the reversion.

Cleasby, for the defendant.—*First*, the defendant is not precluded from referring to the facts stated in the rejoinder. One of the points raised by the demurrer is, whether the rejoinder is a departure from the plea:—this is not the ordinary case of a particular pleading being objected to as mispleaded, in which case the party can go upon the previous pleadings only. [Lord *Denman, C. J.*—No doubt we must look at the whole record.]

The defendant, also, contends that this is a case in the nature of an eviction, but of an eviction by title paramount; if so, the lessor is clearly entitled to distrain. Or if there have been an enjoyment of part, under a contract profess-

(a) 2 Mau. & S. 276.

(b) 1 C. M. & R. 36.

ing to grant the enjoyment of more, it is a case of apportionment. It is clear the plaintiff claims to hold under the contract of demise, not under any new *quantum meruit* contract. The proper construction of the term "title paramount" was stated by *Parke, B.*, on the argument below:—"If the party evicting holds under the defendant by virtue of a former lease, he holds by title paramount to that of the plaintiff(*a*)":—and again, "It means paramount to the lease or other title conveyed (*b*)". Fraud, no doubt, would avoid the contract altogether; but the Court will not assume fraud, but rather that the defendant was mistaken as to his right to make the demise. The case then becomes the same as if the first contract had been made by an ancestor of the defendant, instead of by himself. *Smith v. Raleigh* was a case where the landlord had himself railed off a portion of the demised premises; no doubt that suspended the whole rent. But, under the circumstances of the present case, the defendant contends—*first*, that the rent is not extinguished; *secondly*, that it is apportioned.

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I. To operate an extinguishment, a *tortious entry and expulsion* by the landlord must appear. *Salmon v. Smith* (*c*), and the cases there cited. An entry by the landlord on part of the land is not sufficient. Here there is no tortious act by the landlord as to the one part of the land, after the tenant's entry on the other part. [*Patteson, J.*—The plaintiff says, the act of the landlord before or after the entry of the tenant, is the same, if it prevents the tenant from enjoying what he contracted for. He must contend, that if the landlord conveyed away a field twenty years before, that will have the same effect.] Lord Chief Baron *Gilbert* (*d*) distinctly states the true doctrine on the subject to be, that the lessor shall not, *by his own act*, discharge any part from the burden of the rent, during the

(*a*) 2 C. M. & R. 87.

(*b*) Ibid. 88.

(*c*) 1 Saund. 204, note (2).

(*d*) Gilb. on Rents, 178.

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continuance of the contract; and therefore, if he disseises or ousts the lessee of any part of the land, the whole rent shall be suspended, "because this is a *wrongful act*, to which the tenant consented not." The suspension of the rent is in the nature of a penalty for doing a wrongful act. Here the landlord might be merely mistaken; as in supposing that *Charlton* had had a good notice to quit. *Vin. Abr., Extinguishment* (G. 9), *Co. Litt.* 148. b. and *Walker's case* (a), are authorities to the same effect.

Secondly, this case is in every substantial respect identical with those in which the rent has been held apportionable. If it be apportionable, the landlord may take the apportionment on himself; and, if he distrains for too much, may recover the just sum on a replevin being brought, and cannot be therefore sued in trespass; *2 Inst.* 503; *Stevenson v. Lambard* (b). The principle on which rents are apportioned is simply this—the enjoyment by the lessee of part of the land demised, under the contract; *Clun's case* (c); *Gilbert on Rents*, 145, 179. In the latter place it is said:—"Since the obligation to pay the rent was by the first contract founded upon the consideration of the tenant's enjoying the land, that obligation must still continue on the tenant, so far as it is not cancelled or revoked by any subsequent contract between the parties; and consequently the whole rent shall not be extinguished by a re-demise, but the tenant shall pay rent in proportion to the land he enjoys; because the obligation of the first contract must subsist so far as the tenant enjoys the consideration which first engaged him in such obligation." *Moore's Rep.* 50, *Dyer*, 56, and *Doe v. Meyler* (d), are authorities to the same effect. [*Bosanquet*, J.—Has not the tenant, in all of the cases you refer to, once had possession of the whole land?] In this case there has been an entry by him on the demised premises under the contract, although

(a) 3 Co. Rep. 22 b.

(b) 2 East, 575.

(c) 10 Co. Rep. 128 a.

(d) 2 M. & Sel. 276

not on the whole of them. *Hargrave v. Shewin* (a) shews that, in replevin, the quantity of land alleged in the avowry to be held by the plaintiff is immaterial, because the whole rent issues out of every part of the land: on a traverse, therefore, of *non tenuit modo et forma*, the issue must have been found in this case for the defendant. The plaintiff professes to confess the entry under the demise, and to avoid it by the subsequent fact of his being deprived of part. No case has certainly been found in which the lessee never had possession of a part of the land; but the principle of apportionment equally applies. It may be assumed, that if the plaintiff had entered and occupied the whole demised lands for a week, and had then been evicted out of the eight acres by *Charlton*, there would have been an apportionment; and the case, as it stands, is substantially the same. The distinction is between personal and real contracts; the remedy by distress is not a remedy against the person of the tenant, but a taking of part of the profits of the land. In personal contracts, the party must perform his agreement, in order to enforce it; but it is not so in real contracts. The lessee is charged, not in respect of any personal contract, but in respect of his enjoyment of the realty. All the cases of apportionment are cases where the lessor has not performed his contract. The distinction is fully illustrated in *Walker's* case.

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As to the authority cited from *Bacon's Abr.*, the defendant is not called upon to deny that the lease is void as to the eight acres, though there may be good reason for questioning the doctrine there laid down, which is taken from an argument in *2 Plowden*, 434, and is not borne out by the authorities cited in the margin. But it cannot assist the plaintiff, unless he shews that the lease is void altogether, so as to raise a new implied contract, on which the lessor might sue for use and occupation. *Tomlinson v. Day* was not the case of an entry under a

(a) 6 B. & C. 34.

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lease; the only question in fact was, which was the best test of the value of the actual occupation; no question of apportionment was raised, nor does the case decide any thing as to the right to distrain. In *Gardiner v. Williamson* there was no demise, even as against the party making it, of the tithes; here there is a valid contract, as between the two parties, as much as in *Doe v. Meyler*; there is a contract of demise, by which the party demising is bound, although there is no right conferred in the land (the eight acres), and therefore no demise in its consequences. The date of the replication is immaterial, and no inference can be collected from it.

Bompas, in reply.—In all the cases referred to on the other side, two propositions concur—*first*, that the eviction was by a title paramount to that of the landlord; and, *secondly*, that the tenant was once in possession of all the lands. The *expulsion* mentioned in the note to *Salmon v. Smith* (a) is meant merely in contradistinction to a mere trespass; the lessee must be *put out of possession*. *Co. Litt.* 148. b. is in the plaintiff's favour; this is a wrongful act as against him. The difference between this and the cases of apportionment is, that this amounts to an eviction by the authority of the landlord; the consequence of which, therefore, is the extinguishment of the whole rent.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by Lord DENMAN, C. J.—This is an action of trespass for entering the plaintiff's dwelling-house, and taking his goods.

The declaration is dated the 25th of *April*, 1834. The defendant, on the 24th of *May*, 1834, pleaded that he, being seised of the dwelling-house and certain other pre-

(c) 1 Saund. 204, note (2).

mises, demised the same to the plaintiff for one year from the 25th of *June*, 1833, at the rent of 70*l.*, payable quarterly ; that the plaintiff accepted the lease, and, by virtue of the said demise, entered into and upon the said demised premises, and thereupon became and yet was possessed thereof for the said term so granted to him as aforesaid ; and, until the 25th of *December*, 1833, and from thence until and at the time when &c., held and enjoyed the dwelling-house and premises by virtue of the said demise ; that, on the said 25th of *December*, 1833, 35*l.* of the rent was in arrear, wherefore the defendant entered and made a distress for the same.

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The plaintiff, on the 6th of *December*, 1834, replied that one *Adam Charlton*, before the demise in the plea mentioned, and from thence and still was in possession of eight acres of land of the said demised premises, under and by virtue of a demise theretofore made by the defendant to him, which demise was then and *from thence had been and still was in full force and undetermined*, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the said last-mentioned land, so being parcel of the demised premises in the plea mentioned ; and although he had been willing and desirous of entering, he had been kept out of possession by *Adam Charlton* by virtue of the demise to him, and the plaintiff had been prevented from holding and receiving the profits.

The rejoinder alleges that the plaintiff, at the time of his entering on the demised premises, had notice that *Adam Charlton* was in possession of the eight acres as tenant to the defendant, under a demise for a term then unexpired.

To this rejoinder there is a special demurrer, for inconsistency with the plea and departure therefrom.

The question to be determined is, whether the replication be an answer to the plea.

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It has been argued that the impediment to the plaintiff's obtaining possession of the eight acres demised to *Adam Charlton* by the defendant previously to the demise made to the plaintiff, is in the nature of an eviction. On one side it is contended that it is analogous to an eviction by title paramount, the right of *Adam Charlton* being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself in demising land which he had already parted with; and is not to be distinguished in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession taken by the lessee.

If the former of these views be adopted, the rent will be apportionable, and the distress justified by the plea:—for it is clear that a person may distrain for apportionable rent; and, if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act.

But, we are of opinion that the impediment to the plaintiff's taking possession in this case, is not analogous to an eviction:—for it appears to us that no interest in the eight acres previously demised to *Adam Charlton* passed to the plaintiff by the demise subsequently made to him. The demise to *Adam Charlton* covered the whole time during which the rent distrained for accrued.

But it has been supposed, that notwithstanding the demise to *Adam Charlton*, by which the defendant had parted with his right of possession in the eight acres, the plaintiff by his subsequent lease took an *interesse termini* in these eight acres for the period of his own lease, viz., one year, so as to give him a right to a term for all that

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period, and to the possession on the determination of the the prior lease by efflux of time, or by any other lawful mode, whenever and in whatever way it should be determined; and that the existence of the prior demise being the impediment by which alone the plaintiff was prevented from obtaining possession under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount: and, if any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case; considering that eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence.

It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void.

It has been already observed that the demise to *Charlton* made previously to the demise to the plaintiff, covers the whole of the plaintiff's term; or at least the whole period for which the distress was made. Now, it is expressly laid down in *Bacon's Abr., Leases*, (N.), (which is to be considered as the language of Lord Chief Baron *Gilbert*) as follows:—"If one make a lease to A. for ten years, and the same day make a parol lease to B. for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the conditon broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it;

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and the second lease being made the same day, and for no longer term than the first ten years, would not pass any interest as a future *interesse termini* certainly; for, the first lessee had the whole interest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void for want of a power in the lessor to contract for it: and as a reversionary interest it cannot be good for want of a deed." And a little further on, "But now, if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years for the reasons before given, but for the last ten years it had been good; because, when the first ten years were elapsed, the second lessee might then execute and reduce into possession by entry as well as if it had been at first made in possession; for, it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but, as a grant of the reversion such second lease could not be good for want of a deed, for the reasons before given, neither could any attornment help it or let in the second lease, till the first ten years ran out by effusion of time." And afterwards it is said that if, after a lease for ten years, a second lease by deed poll were made for twenty years, it might take effect with attornment as a grant of the reversion, or, if no attornment could be had, "yet it would enure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol."

It has been remarked that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge v. Clowse*, in Plowd. 421; but it may be answered, that although the matter introduced into *Bacon's*

Abridgment is first distinctly found in the argument set forth at length in *Plowden*, it now stands upon the authority of Lord Chief Baron *Gilbert*. Moreover, the point immediately under consideration in this case is confirmed by the opinion of *Gawdy J.*, in *Dove v. Willcot*, *Cro. Eliz.* 160, who says, "If a lease be made for two years, and after the lessor let the land for four years, this is but a lease for two years, *although the first lessee surrender*, for he had no power to contract for the first two years at the beginning; but otherwise when the estate is determinable upon an uncertainty;" and cites *Plowd. Comment. Smith & Stapleton's* case, which is the case where the argument is fully stated—fo. 432.

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It may be remarked also that in *Comyns's Digest*, title *Estates* (G. 13.), it is said that a lease which cannot take effect in interest, except by possibility, if it be not an estoppel, shall be void; as, if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. For this he cites *Plowden*, 432, and though this statement be only part of the language of the apprentice who argued the case of *Smith v. Stapleton*, Chief Baron *Comyns*, by introducing it in this general way, must be considered as adopting it in some degree at least as authority: in what is said by *Gawdy*, as referred to in *Cro. Eliz.* 160, there is afterwards added *Smith v. Stapleton*, *Plow.* 426, though it is not clear whether this be his language or that of the reporter.

This same doctrine, as far as regards a second parol lease for years after a former lease for years, appears to have been treated as clear law in various books; though the effect of such a lease made after a prior lease for life, has been the subject of discussion.—See *Bro. Abr., Lease*, pl. 35, 48; *Plowden*, 521, note of the reporter. *Welchden v. Elkington*, *Plowd.* 521; *Plowden's Quæries*, 122 and 161; Sir *Hugh Cholmondeley's* case, *Moore*, 344, in the argument of *Cook*, Attorney General. So, in *Watt v. Maydewell*, *Hutton*, 105—"If a man make a lease

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for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void ; but if the second lease had been by deed, and he had procured the former lessee to attorn, he shall have the reversion." *Edward v. Staler, Hardr. 345*, arguendo. So, *Sheppard's Touchst. 275 b.* : " If the second lease be for the same or a less time, as, if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part *void* ;" but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment when attornment is necessary, and without, if not necessary. But, if the second lease be by *word of mouth* it is otherwise :"—" And if the second lease be by *fine, or deed indented*, then it may work by way of *estoppel* both against the lessor and the lessee ; so that, if the first lease happen by any means, as, by surrender or otherwise, to determine before it be run out, then the second lessee shall have it."

Upon these authorities, therefore, we feel ourselves obliged to hold that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to *Charlton*.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner v. Williamson, 2 Barn. & Adolph. 336*, where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised by parol at a rent of 200*l.* per annum, and a distress made for arrears, the Court of *King's Bench* held that an action of trespass would lie, because the demise of the tithes, being by parol, was void. There was no valid demise, it was said, of the whole subject matter, nor any distinct rent reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which alone a distress could be made.

And accordingly, in a case of a lease by indenture, *Dyer* is reported to have held (*Moore*, 50), that, if lands at common law and copyhold lands are leased by indenture rendering rent, all the rent is issuing out of the lands at common law; for the lessor had no power to make such a lease of copyhold, wherefore as to this the lease is utterly void; but it is added, that if a man lets lands, parcel of which he is seized of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void but voidable. In this last case the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was therefore liable in respect of such interest and enjoyment to a portion of the rent. In the case before the court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it.

It may further be observed, that, even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry in case the demise to *Charlton* should happen to be forfeited or surrendered, yet, as that demise to *Charlton* was in force at the commencement of the plaintiff's tenancy, and continued during the whole period, in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect; and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in

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which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire rent was reserved. In this respect it is strictly analogous to *Gardiner v. Williamson*.

In the case of *Tomlinson v. Day*, 5 *Moore*, 558, which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress or by action for the rent. It was an action for use and occupation, in which he was allowed to make use of an agreement for a lease (according to the express provision of the statute 11 *Geo. 2*, c. 19, s. 14), "as evidence of the quantum of damages to be recovered;" and, as the defendant had been interrupted in the full enjoyment of what had been agreed for, the plaintiff was held "entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent." The interruption to the defendant's right of exclusive sporting was indeed compared by Lord Chief Justice *Dallas* and Mr. Justice *Richardson* to an eviction; but, if it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person; but it was defeated, because other persons interfered who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment according to the acknowledged rule; and would not assist the argument in favour of the defendant.

Upon the whole, therefore, we are of opinion that the judgment of the Court of *Exchequer* ought to be reversed.

Judgment reversed.

END OF TRINITY TERM.

AN
I N D E X
TO THE
PRINCIPAL MATTERS.

ACCORD AND SATISFACTION.

The lapse of twenty years from the time of making a contract to be performed *in futuro*, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Siboni v. Kirkman*,
418

ACCOUNT STATED.

See PARTICULARS OF DEMAND, 2.

ADMISSION.

1. An admission on the face of one plea cannot be made use of to prove or disprove another plea.

But where it appears, from the whole conduct of a cause, that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to that fact as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record. And the Court refused to grant a new trial, on the ground that the Judge had stated to the jury a fact so admitted between the parties, as being admitted *on the record*, and applied such supposed admission in support of another issue. *Stracy v. Blake*,
168

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ADMISSION.

2. In an action on a bond, to which the defendant had pleaded *non est factum*, the Judge made it one of the terms of an order to change the venue, that the defendant should admit the handwriting of the attesting witness on the trial of the cause. The cause was tried, and the plaintiff obtained a verdict, which the Court afterwards set aside, and granted a new trial on payment of costs, giving the defendant leave to amend the oyer and set out the condition more fully, which was accordingly done, and the defendant then pleaded a special plea, alleging that the condition had been altered since the execution of the bond:—*Held*, that the plaintiff was entitled to use the admission contained in the Judge's order on the second trial, and that it was binding on the defendant. *Langley v. The Earl of Oxford*,
508

AFFIDAVIT.

I. *To hold to bail.*

(1). *Cause of action.*

1. An affidavit of debt in an action by the indorsee against the drawer or indorser of a bill of ex-

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change, must shew a default by the acceptor. *Crosby v. Clarke*, 296

2. An affidavit of debt stated the defendant to be *indebted* to the plaintiffs in 40*l.* for the *hire* of a berth on board a vessel of the plaintiffs, let by the plaintiffs to the defendant at his request:—*Held* sufficient. *Shepherd v. O'Brien*, 601

(2). *Before whom sworn.*

Where an affidavit of debt was sworn in *Ireland*, before a commissioner of the *Common Pleas* and *Ex-quer*:—*Held*, that the title of the Court need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such commissioner, to be afterwards intitled and used in either Court. *Perse v. Browning*, 362

II. *Objection to, when waived.*

Where, on shewing cause against a rule for setting aside an attachment against the sheriff on payment of costs, the only question made was, whether the bail-bond should stand as a security, and the Court made the rule absolute with that term, but the plaintiff subsequently discovered that an error had been made in the dates, and that he was not entitled to have the bail-bond stand as a security:—*Held*, that he could not then urge a formal objection to the affidavits on which the rule was obtained. *Langton v. Viney*, 479

AMENDMENT.

(*Of writ.*)

In an action of debt on bond, and for money paid, the Court refused to amend the writ of summons, which had been sued out on promises instead of in debt, in order to save the Statute of Limitations; inasmuch as the remedy on the bond would remain, notwithstanding the expiration

of the six years. *Partridge v. Wallbank*, 316

ARBITRATION.

I. *Submission.*

By an agreement of reference, it was recited that the plaintiff had given notice of appeal against a rate made upon him, and that the defendants, the churchwardens and overseers, intended to defend the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them, as stated in the said notice, to arbitration, no appeal was entered against the rate; and that the parties, in order to prevent further expense, and to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the matters mentioned therein to arbitration. The agreement then witnessed that the defendants (as far as they lawfully could as such churchwardens, &c.) and the plaintiff mutually agreed to abide by the award of *W. A., R. D.*, and *P. B.*, or any two of them, who were to award and determine of and concerning the said matters in difference, and of and concerning all the costs, &c., of the said agreement and of the said notices of appeal, and of the said churchwardens, &c., in consequence of such notice of appeal, and of their preparation to resist such appeal, and to support the rate, and all matters relating thereto. The arbitrators awarded that the defendants should pay unto *T. E. F.*, attorney for the plaintiff, 16*l.* 12*s.*, his bill already delivered, and the amount of the costs of the said *T. E. F.* attending the arbitration, &c.; and they further directed that the defendants

should deduct from the amount charged in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation:—*Held*, on error, that the submission and award were bad, inasmuch as the arbitrators had no authority to determine as to the validity of the rate, it not being by law a subject matter capable of reference to arbitration; and that the decision as to the costs incurred was merely accessory to the decision of the principal question; and there was therefore no sufficient consideration for the submission. *Thorp v. Cole*, 531

II. *Enlargement of time.*

A cause was referred by order of *Nisi Prius* to the decision of an arbitrator, so as he made his award before the fourth day of *Easter* term, with power to enlarge the time, but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired, the arbitrator, in the presence of both parties, appointed another meeting on the 29th of *June*, on which day one of the parties not having attended, the arbitrator made his award:—*Held*, that the appointment of a further day for the reference, neither party making any objection to it, amounted to a due enlargement of the time.

The power given to the Court or a Judge by 3 & 4 *Will.* 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, is general, and is not confined to cases where there has been a revocation of the submission. *Burley v. Stephens*, 156

III. *Award.*

1. An action for certain commission on the purchase of land, and all matters in difference between the parties were referred to arbitration; the

costs of the suit and of the reference and award, and all other costs, to abide the event; final judgment to be entered up for the plaintiff or defendant, according to the award, for any damages or costs awarded to either of them, and execution to issue. The arbitrator awarded, that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay to the defendant the sum of 36*l.* 13*s.* 4*d.*, which he found to be due and owing from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from the receipt of his commission on certain land purchased, to which he would be entitled under a certain agreement:—*Held*, that the arbitrator had no power given him to order a verdict to be entered, but merely to decide whether the plaintiff had any cause of action against the defendant; and that the award was sufficiently final. *Harding v. Forshaw*, 415

2. An action of trespass *qu. cl. fr.*, in which there was a justification of a public right of way, was referred to an arbitrator, with power to direct what should be done between the parties. He directed a verdict for the defendant, and that the plaintiff should put up a stile and bridge upon the way, in a place described. It appeared that that place was not on land of either the plaintiff or defendant:—*Held*, that this latter part of the award was void. *Turner v. Swainson*, 572

ARREST.

See TRESPASS, 2.

(*Privilege from.*)

The defendant, an attorney, was arrested at the *Auction Mart Coffee-house*, between two and three o'clock p. m. The statement in his affidavit, in support of a motion for his dis-

charge on the ground that he was privileged *eundo*, was, that having professional business in several cases to transact in this Court, he was proceeding through the city of *London*, on his way to *Westminster Hall* for that purpose, and on arriving at the Bank of *England*, recollected that he had business with a client, whom it was probable he should find at the *Auction Mart*; that he therefore called there in his way to *Westminster Hall*, and saw his client, and just as he was about to leave him for the purpose of proceeding to *Westminster*, he was arrested in this cause:—*Held*, that on this statement he was not entitled to the privilege. *Strong v. Dickenson*, 488

ASSESSMENT OF DAMAGES.

See BOND, 1.

ATTACHMENT.

1. A rule was granted, directing the payment of a sum of money by the attorney in a cause, to be absolute unless the attorney shewed cause at chambers by a given day. The attorney made several appointments for attendance at chambers, which he broke, and did not appear within the time limited. The Court, nevertheless, refused to grant a rule for an attachment absolute in the first instance. *Richmond v. Bowditch*, 40

2. A render by the sheriff, after the expiration of the body rule, although no bail have justified, entitles the sheriff to have an attachment against him set aside on payment of costs. *Rex v. The Sheriff of Middlesex*, 37

3. Where a plaintiff rules the sheriff in vacation to return the writ, or bring in the body, with the view of proceeding against the sheriff in the next term, he will not be entitled against the sheriff to any damages

which may accrue intermediately between the default and the attachment, unless he give the sheriff notice of his intention to proceed against him, when the irregularity is first discovered.

The costs of such notice will be included in the costs of the attachment. *Rex v. The Sheriff of Essex*, 720

ATTACHMENT OF PRIVILEGE.

See ATTORNEY, II.

ATTAINDER.

A. in *January*, 1815, was convicted of bigamy. In *April*, 1815, he conveyed away by lease and release certain lands in which he had a life estate:—*Held*, that such conveyance was not void as against the Crown, there having been no *attainder*. *Rex, on the prosecution of Reynolds, v. Bridger*, 145

ATTORNEY.

See ARREST.

EVIDENCE, 4.

COSTS, (3).

I. Admission.

An attorney who has been admitted, or re-admitted, in another Court, has a right to be admitted or re-admitted in this Court as of course, without giving any notice, or undergoing any examination. *Ex parte Parry*, 295

II. Privileges of.

Since the Uniformity of Process Act, 2 Will. 4, c. 39, an attorney can no longer sue by attachment of privilege; and therefore, though he sues in his own Court as a common person, the Court will not enter a suggestion on the roll to deprive him of costs for not suing in the *Middlesex* Court of Requests. *Wright v. Skinner*, 144

III. *Lien.*

A. devised certain estates to trustees, upon trust to pay a part of the rents and profits to his widow, and the residue towards the maintenance and education of his son, until he reached twenty-one; and after that time to him, during the lifetime of the widow; and upon her death he devised the estates to his son in fee. The trustees having occasion to employ the defendant, an attorney, to defend certain causes and suits in carrying into effect the trusts of the devise, incurred a debt to him for certain costs and expenses, for which they deposited the title deeds with him as a security:—*Held*, that the defendant had no lien upon them against the son, after the decease of his mother, as the debt was the personal debt of the trustees. *Lightfoot v. Keane*,

IV. *Taxation of bill.*

In an action on an attorney's bill, the plaintiffs gave notice, pursuant to 3 & 4 Will. 4, c. 42, s. 34, that they should claim interest from the date of the notice. After the writ was issued, the bill was referred to taxation at the instance of the defendant, no terms being made as to the allowance of interest:—*Held*, that the plaintiffs could not afterwards have an assessment of damages for the purpose of recovering the interest. *Berrington v. Phillips*,

48

BAIL.

*See Process, 4.*I. *To the Sheriff.*(1). *Deposit in lieu of.*

Where money is paid into Court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is

entitled to have the money paid out to him in discharge of the debt and costs. *Bull v. Turner*,

47

(2). *Assignment of bail-bond.*

An assignment of a bail-bond is invalid, if executed in the presence of and attested by the plaintiff in the action and another person; the statute 4 Anne, c. 16, s. 20, requiring the assignment to be made to the plaintiff in the presence of two *credible* witnesses, which means disinterested persons. *White v. Barrack*,

424

(3). *Proceedings on bail-bond.*

1. Where the principal and bail are sued together on the bail-bond, and the bail apply for a rule to stay proceedings on payment of costs, (no irregularity being imputed), the affidavits in support of the rule may be intitled either in the original action, or in the action on the bail-bond.

On such an application, the Court has authority to stay the proceedings as against all the defendants.

The bail-bond cannot stand as a security, unless there has been the loss of an *intermediate* trial, before the application was made to stay the proceedings. *Stride v. Hill*,

37

2. Declaring *de bene esse* in the original action is no waiver of previous proceedings in an action on the bail-bond.

The plaintiff signed an agreement with an agent of the defendant, on the 29th of September, that on the defendant's entering into an agreement to pay the debt, part in iron within a month, and the remainder by bill at two months, the action should be discontinued; and the defendant was to call on the plaintiff on the following day, to enter into the agreement. He never did so call. On the 8th of October the plaintiff

gave notice to the defendant that he held himself disengaged from the agreement, and should proceed with the action forthwith. On the 20th of *October*, the defendant delivered to the plaintiff, and the latter received, two bills of exchange for the greater portion of the debt. He did not deliver any iron, and became bankrupt on the 6th of *November*:—*Held*, that there was not a giving of time to the defendant, so as to discharge the bail.

Bail applying to be discharged from liability on the ground of an agreement for giving time to the principal, must come in the term next after they know of the agreement. *Vernon v. Turley*, 312

II. Bail above.

(1). Notice of Justification.

It is not necessary to state, in a notice of justification of bail, whether the bail intend to justify in person or by affidavit. *Norton's bail*, 632

(2). When discharged.

Where the plaintiff, in the progress of a cause, agreed to give the defendant a month's time to pay the debt, the time expiring before judgment could by the practice of the Court be obtained, and final judgment not having been in fact signed before the arrangement was entered into:—*Held*, that the bail were not discharged. *Whitfield v. Hodges*, 679

BANKRUPT.

Discharge of.

Semble, that the affidavit in support of a motion to discharge a defendant, on the ground that he has become bankrupt and obtained his certificate, must shew that the certificate is inrolled. And the rule

should be drawn up on reading the inrolment.

A defendant who had obtained his certificate as a bankrupt after the action was brought, was held entitled to be discharged out of custody, although the fiat issued long before the action was commenced, and the defendant had pleaded, not setting up his bankruptcy, and given a *cognovit*, conditioned for payment at a later period than judgment would have been obtained in the regular course. *Osborne v. Williamson*, 550

BANKRUPTCY.

1. An agreement between a petitioning creditor, who has sued out a fiat in bankruptcy, and the bankrupt, that the former shall abandon the prosecution of the fiat, and that the bankrupt shall accept a bill of exchange for a certain amount, is illegal, even as between the bankrupt and the petitioning creditor; and the bill of exchange accepted by the bankrupt, in pursuance of such an agreement, is void, and no action can be maintained upon it. *Davis v. Holding*, 159

2. An assignment by a trader to a creditor of *all* his effects and stock in trade, is of itself an act of bankruptcy. *Siebert v. Spooner*, 714

BASTARD.

By the 4 & 5 *Will.* 4, c. 76, s. 57, the putative father of a bastard child born before the passing of the act, whose mother is married to another person, is no longer liable on an order of justices for the maintenance of such child; at least while the husband is of ability to maintain it.

Semble, the 4 & 5 *Will.* 4, c. 76, s. 57, operated as a repeal of the 18 *Eliz.* c. 3, s. 2, and 49 *Geo.* 3, c. 68. *Lang v. Spicer*, 129

BILLS AND NOTES.

I. *Property in.*

A., resident abroad, remitted a bill to *B.*, his agent in *England*, drawn by *A.*, and specially indorsed by him to *C.*, with whom his children were at school, in payment of *C.*'s account for their board and education. *B.* got the bill accepted by the drawees, and sent a letter by post to *C.*, stating that he had received a commission from *A.* to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in *B.*'s hands, he received directions from *A.* to keep it, and the proceeds, in his hands, and to have a fair investigation into *C.*'s accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and *B.* detained the bill:—*Held*, that *C.* could not recover it in trover. *Brind v. Hampshire*, 365

II. *Liability on.*

Assumpsit by the drawer against the acceptor of two bills of exchange, payable respectively six and twelve months after date. The plea set forth an agreement (not stated to be in writing) between the plaintiff and defendant, by which, before the making of the bills, it was agreed that the defendant should be discharged from all liability in an action commenced against him by the plaintiff on a promissory note, on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question,—in case the plaintiff should recover in another action brought by him against another party, on a promissory note given under similar circumstances to the defendant's; and that until he should so recover, or if he should not

so recover, he should not call for payment of the bills of exchange: and the plea averred that the defendant accordingly paid the costs and money agreed for, and accepted the bills of exchange in question; and that the action against such third party was still undetermined:—*Held*, on demurrer, that the plea was bad; inasmuch as the defendant could not vary the absolute contract entered into by the bills of exchange by a contemporaneous oral contract inconsistent with it. *Adams v. Wordley*, 374

III. *Indorsement of agreement on.*

On an action coming on to be tried at the assizes, an agreement in writing was entered into, that the trial should be postponed till the next assizes, on the defendant in that action, and the now defendant, undertaking to give the plaintiff a promissory note, payable on demand, by way of security, in case the plaintiff should recover a verdict against the then defendant, to be given up if the plaintiff, the payee, should fail in that action. The note was accordingly given, but after it was signed, a memorandum was indorsed upon it, stating that the note was given upon the condition mentioned in the agreement:—*Held*, that this indorsement was to be considered as merely a marking of the note for the purpose of identification, and not as an incorporating of the agreement, so as to render the note an agreement or a conditional promise. *Brill v. Crick*, 223

IV. *Actions on.*(1). *Title of Indorsee.*

In *February*, 1829, *A.* and *B.* were in partnership as brewers, *A.* being interested only as executor of a former partner, on behalf of his infant son. *B.* advanced 300*l.* to *D.* out of the funds of the firm, and took his

promissory note for that amount, payable to the order of *B.* on demand. In November, 1829, *C.* purchased the interest of the deceased partner, and the concern was thenceforth carried on by *B.* and *C.*, and a notice was then inserted in the *Gazette*, signed by *A.*, *B.*, and *C.*, of the dissolution, and that all persons indebted to the firm should pay their debts to *B.* and *C.* *A.* became a large creditor of the firm, and in April, 1831, the note in question was indorsed by *B.*, to *B.* and *C.*, and by them to *A.*, as part security for advances made by him. In August, 1831, *B.* obtained from *D.* his acceptance for 300*l.*, as in lieu of the promissory note, representing that *A.* wished for a fresh security, and undertaking to get back and deliver up the note, but which was never done. *B.* and *C.* became bankrupts. The bill of exchange was subsequently paid by *D.* to *A.*'s attorney, but there was no evidence why it came into his hands.

In an action by *A.* against *D.* (commenced in 1835) on the promissory note:—*Held*, that the plaintiff was entitled to recover, unless the jury could infer from the circumstances of the case that he knew that the bill of exchange was given for the same debt as the promissory note. *Adams v. Bingley*, 192

(2). *Evidence.*

1. In an action by the indorsee against the acceptor of a bill of exchange, it is competent to the acceptor to shew that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by the plaintiff. *Thompson v. Clubley*, 212

2. In an action by the second indorsee against the acceptor of a bill of exchange, at two months' date the

defendant pleaded that the bill was indorsed to the plaintiff when overdue. It was proved for the defendant that it was drawn and accepted for the accommodation of *R.*, the first indorsee, in July 1830. *R.* was then an intimate friend of the defendant, but they afterwards quarrelled. No notice of its dishonour was given to the drawer. After the action was brought (in the present year) the defendant's attorney applied to the plaintiff to settle it: the plaintiff said that *R.* owed him much more money, and that as he had given value for the bill, he must go on with the action. The plaintiff did not call *R.* at the trial:—*Held*, that there was evidence to go to the jury, that the bill was transferred to the plaintiff after it became due. *Bounsall v. Harrison*, 611

(3). *Proof of consideration.*

Assumpsit by the indorsee against the acceptor of a bill of exchange. Plea—that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did he the defendant receive, any consideration for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration. Replication—that the drawer indorsed the bill to the plaintiff for a good and valuable consideration:—*Held*, that it was not incumbent on the plaintiff to begin, and prove, in the first instance, that he gave value for the bill; but that the rule is otherwise, where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen. *Mills v. Joseph Barber*, 425

V. Discharge of.

Assumpsit by the indorsee against the acceptor of a bill of exchange for

BOND.

43*l.* Plea, that, after the bill became due, one *G. P.*, the drawer of the bill, made his promissory note for 44*l.*, and delivered the same to the plaintiff in full satisfaction and discharge of the bill. Replication, that although he, the plaintiff, accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid:—*Held*, that the replication was bad, and that the plaintiff having accepted the note in full satisfaction and discharge of the bill, could not sue upon the latter.

Held, also, that the plea was sufficient. *Sard v. Rhodes*, 153

BOND.

1. A bond conditioned for payment of a sum of money to the obligee, on a day named, according to a proviso contained in a conditional surrender of even date, whereby *A.* (not the obligor in the bond) surrendered to the obligee certain copyhold lands, for securing payment of the same sum,—was held to require only a 1*l.* stamp, although it bore no stamp denoting the payment of the *ad valorem* duty on the surrender, and the latter was not produced.

On *non est factum* pleaded to such bond, where breaches are assigned in the declaration, the jury may assess the damages without a special award of *venire* for that purpose. *Quin v. King*, 42

2. A bond given to secure the faithful performance of the office of a collector of parochial rates (who was by act of Parliament to be appointed by trustees for a year, and then to be capable of re-election) was conditioned, that, “from time to time, and at all times thereafter, during such time as he should continue in his *said* office, whether by virtue of his *said* appointment, or of any re-appointment

thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavours to collect the monies received by means of the rates, in the then present or in any subsequent year,” &c., &c.:—*Held*, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed. *Augero v. Keen*, 390

3. Action on a money bond for 2800*l.*, the penal sum. Plea, craving oyer of the condition (which was for securing the repayment of 1400*l.* and interest), as to 800*l.*, parcel of the sum of 1400*l.* in the condition mentioned, that, after the day named in the condition, the defendant paid the sum of 800*l.*, parcel of the said sum of 1400*l.*:—*Held*, on special demurrer, that the plea was bad.

Where three persons entered into a joint bond, and it did not appear, either on the bond or condition, that two of them were sureties for the other:—*Held*, that a release given by the obligee to the representative of one of the deceased obligors was no answer to an action against the surviving obligors.

In an action of debt on bond, it is not necessary to aver a breach in non-payment of the money. It is sufficient for the plaintiff to shew the debt due, and then it lies on the defendant to discharge himself. *Ashbee v. Pidduck*, 564

BOUGHT AND SOLD NOTES.

See EVIDENCE, 1.

BRISTOL DOCK ACT.

The 5 *Geo.* 4, c. lxxix., (the *Clifton* Watching and Lighting Act), does

not extend to those parts of the parish of *Clifton* which, by the 16 *Geo. 3*, c. 33, and 43 *Geo. 3*, c. 140, were made part of the city of *Bristol*.
Bartlett v. Watkins, 223

BUILDING ACT.

The Building Act, 14 *Geo. 3*, c. 78, s. 43, which authorizes the building or raising of a party-fence wall, does not protect a party from liability for any collateral damage resulting from the building so erected; and an action on the case is maintainable by the occupier of an adjoining house, for heightening and building on a party-fence wall, whereby his windows were darkened. *Wells v. Ody*, 452

CARRIER.

Goods were forwarded by *K.*, a carrier, from *London* to *Liverpool*, addressed to the plaintiff (at the *Isle of Man*), "care of *D.* (the defendant), *Brunswick-street, Liverpool*." The goods were landed by *K.* on a public wharf at *Liverpool*, and on the same day notice was sent to the defendant of their arrival, and he signed the carrier's book, containing an acknowledgment that the goods in question had arrived for him (the defendant). He caused them also to be entered in the clearance and manifest of a steam-vessel about to sail for the *Isle of Man*.

It was proved also, that on former occasions, when goods had been brought by *K.* for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the goods until six days after their arrival, when they were not to be found:—*Held*, in an action on the case against the defendant for negligence in not taking proper care of the goods, that there was evidence for the

jury of a delivery to and acceptance by him. *Quiggin v. Duff*, 174

CONTRIBUTION.

The rule that there is no contribution among joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

Where several persons were jointly interested in a stage-coach, and there was a partnership fund, out of which expenses were first to be paid, and the residue divided amongst them:—*Held*, that one of them, against whom damages and costs had been recovered in an action brought by a party to whom damage was done by the negligent driving of the coach, could not recover against another proprietor his proportion of such damages and costs. *Pearson v. Skelton*, 504

COSTS.

See COURTS or REQUESTS ACTS.

(1). Of Pauper.

Where a plaintiff sues *in forma pauperis*, and recovers only a farthing damages, he is entitled to have his costs taxed in the usual way, and is not merely entitled to costs out of pocket.

Where there are several issues, on one of which only the plaintiff succeeds at the trial, the plaintiff is only entitled to the costs of such parts of the briefs, and of such of the witnesses, as were necessary for the issue on which he succeeded.

Where, in an action by the plaintiff *in forma pauperis* against several defendants, a verdict is found for some of them, they are not entitled, under the rule of *Hilary Term*, 2 *Will. 4*, s. 74 to have their costs deducted

from the plaintiff's costs, because they would not be entitled in such a case to receive costs from the plaintiff. *Gougenheim v. Lane*, 136

(2). *Double Costs.*

A justice of the peace is not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs.

Semble, that a justice of the peace is entitled to double costs on discontinuance before trial, under the 7 Jac. 1, c. 5. *Fosbrooke v. Holt*, 205

(3). *Under 43 Geo. 3, c. 46.*

1. The plaintiff arrested the defendant for 42*l.* 5*s.* money lent, and proved on the trial admissions of the loan of 18*l.*, for which amount she had a verdict. On a motion to allow the defendant his costs under the statute 43 Geo. 3, c. 46, s. 3, it appeared from the plaintiff's affidavit, that she had lent the defendant sums of money at different times, amounting to the sum for which he was arrested, but it did not appear that she had any witness to or evidence of such loans, beyond the defendant's admissions as proved on the trial. The defendant swore that she had lent him only 1*l.* The Court, although believing from the affidavits that the whole sum was due, and that the defendant's affidavit was false, held, that as the plaintiff could have had no reasonable ground to expect that she could recover the whole debt for which she made the arrest, the defendant was entitled to his costs under the statute. *Lewis v. Ashton*, 493

2. After a defendant had been arrested for 200*l.* by an attorney, he applied to have the plaintiff's bill taxed, which was ordered, upon the terms of the plaintiff being at liberty

to sign judgment for the amount taxed, and the defendant undertaking to pay that amount and the costs of the action; the Master allowed upon taxation 149*l.* only, but disallowed 60*l.* actually expended by the plaintiff in preparing briefs, &c. in great haste, by the defendant's direction, upon which extra charges were made by the copyists:—*Held*, first, that the plaintiff had a probable cause for the arrest; and, secondly, that the defendant was estopped by the terms of the order from complaining of the arrest. *Watkins v. O'Gorman Mahon*, 722

(4). *On New Assignment.*

In case, the defendant pleaded the general issue, and justified under a right, which the plaintiff traversed. The plaintiff afterwards obtained an order to amend upon payment of costs, and withdrew the traverse, and new assigned excess; the defendant confessed the new assignment, and withdrawing so much of the general issue as applied to that part of the declaration new assigned, paid into Court 10*l.*, which the plaintiff took out. The Master allowed the plaintiff the costs of the writ, and of the new assignment and subsequent proceedings, but gave the defendant the other costs, and the general costs of the cause:—*Held*, that the Master was right.

Quære, whether the plaintiff was not entitled to some portion of the declaration, if it could be ascertained? *Griffiths v. Jones*, 731

COURT OF REQUESTS ACTS.

1. A defendant is not entitled to enter a suggestion for double costs under the *Middlesex* County Court Act, 23 Geo. 2, c. 33, where the debt is reduced below the sum of 40*s.* by a set-off. *Jenkinson v. Morton*, 300

2. If a defendant seeks to enter a

suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a Court of Requests, he cannot at the same time have the costs of issues, which have been found in his favour, taxed for him in the superior Court.

A Court of Requests Act required that persons inhabiting within the town of *Birmingham*, or using or frequenting the markets there, or working or seeking a livelihood, or in any way trading or dealing within the same, should be sued for debts under 5*l.* in the Court of Requests:—*Held*, that such “using or frequenting the markets,” or “trading or dealing,” must be for the purpose of substantially obtaining thereby the party’s whole livelihood. *Jenks v. Taylor*, 578

3. A Court of Requests Act deprived of costs a plaintiff who should not recover to the amount of 5*l.* against a defendant resident within its jurisdiction:—*Held*, that the act applied to a case where such defendant pleaded payment into Court, and the plaintiff replied damages *ultra*, and recovered on that issue less than 5*l.* *Bernard v. Turner*, 580

COVENANT FOR TITLE.

See VENDOR AND PURCHASER.

CUSTOM OF THE COUNTRY.

See LANDLORD AND TENANT, 2.

CUSTOMS ACTS.

The condition of a recognizance to pay the seizing officer the costs occasioned by a claim, is broken by the non-payment to the seizing officer of the general costs of resisting the claim, though such costs are not incurred personally by the seizing officer. *Rex v. Bullock*, 726

DEVISE.

DEVASTAVIT.

If a defendant executor plead to the action, and do not plead *plene administravit*, the judgment against him is evidence of a devastavit; and if, after the production of such judgment, upon a *scire fieri* inquiry, the sheriff returns *nulla bona testatoris*, the Court will quash the return, and award a new *scire fieri* inquiry. *Palmer v. Waller*, 689

DEVISE.

1. A testator devised certain real estates to trustees and their heirs, upon trust that his daughter *M.* should, until she should attain the age of twenty-one, if sole and unmarried, receive out of the rents and profits an annuity of 60*l.*, and that she should thereafter and until she attained thirty-one, if sole and unmarried, receive an annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should be paid only an annuity of 50*l.*, for her sole use, and that the estates should immediately upon the marriage be in trust for the children of his daughter *M.*, as tenants in common in tail; and for default of such issue, in trust for his the testator’s sister *S.* and her heirs for ever: provided always, that in case his said daughter *M.* should marry with the consent of the trustees, it should be lawful for them to settle the estates upon *M.* and her husband for their joint lives and the life of the survivor, with remainder to the issue of the body of his said daughter, in such shares and proportions as the trustees should appoint, and in default of such appointment in such shares and proportions as were thereinbefore limited. *M.* married with the consent of the trustees (upon which occasion a settlement was made pursuant to the will) and died without issue:—*Held*, that the remainder to *S.* was con-

ditional, depending on *M.*'s marriage *without* consent; and that *M.* having married *with* consent, the remainder to *S.* failed, although *M.* died without issue. *Toldervy v. Colt*, 250

2. A testator by his will devised different estates, consisting of houses and land, to different devisees, (some of whom were of his own name), to some in fee, and to others for life only; and by a residuary clause, devised all the rest, residue, and remainder of his messuages, land, &c., not thereinbefore disposed of, to his wife, her heirs, executors, administrators, and assigns for ever. The following clauses were added by the testator, immediately before executing the will—"I do further give to my wife, this house wherein I now live; also the cottage, and all the building, cattle, and everything belonging to me in and about this house."—"I also entail my land to the *Spencers'* male heir so long as one shall remain." The testator's own name was *Spencer*:—*Held*, that the devise to the wife of the residue was not affected by the subsequent specific devise, or by the devise to the *Spencers'* male heir; that the devise of the residue and the specific devise to the wife, were not inconsistent, and might both stand together; and that the clause as to the entail, was either unintelligible, or inapplicable to the property devised to the wife. *Doe d. Spencer v. Pedley*, 662

DISTRESS.

1. A landlord is liable to some damages, in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in

being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, in replevying the crops.

An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises besides growing crops. *Piggott v. Birtles*, 441

2. By the 6th section of the 57 Geo. 3, c. 93, it is enacted, that "every broker, or other person, who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs, &c., of any distress, to the person on whose goods and chattels any distress is levied:"—*Held*, that a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him to make a distress, in not delivering a copy of the charges of the distress. *Hart v. Leach*, 560

3. The *overplus*, which by the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, is directed to be left in the hands of the sheriff, under-sheriff, or constable, on a distress, for the owner's use, means the overplus after payment of the rent and of the *reasonable* charges. Therefore, in an action on the case for not leaving the overplus in the hands of the sheriff, &c., for the plaintiff's use, the plaintiff may question the reasonableness of the charges.

And where the plaintiff herself received from the broker the balance remaining after payment of the rent and the actual charges, making no objection as to their reasonableness:—*Held*, that it was a question for the jury whether she accepted such balance in satisfaction, and if not, whether it was sufficient to satisfy the real balance: but that it was not correct to lay it down as matter of law, that such payment and receipt substantially satisfied the requisitions of the statute. *Lyon v. Tomkies*, 603

4. Salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation. The boat of the plaintiff, an alkali manufacturer, was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture:—*Held*, (*Parke, B., dissentiente*), that she was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt. *Muspratt v. Gregory*, 633

5. A lessee of one hundred acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres, until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease:—*Held*, on error, (reversing the judgment of the Court of *Exchequer*), that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it. *Neale v. Mackenzie*, 747

EJECTMENT.

I. Service of Declaration—On whom.

An affidavit, stating that a copy of the declaration in ejectment had been delivered to a servant of the tenant in possession, who was left in care of

the premises, is insufficient to move for judgment against the casual ejector, and the Court will not even grant a rule to shew cause on such an affidavit. *Doe d. Read v. Roe*, 633

II. Notice under 1 G. 4, c. 87.

A notice given by a landlord in ejectment, under the 1 Geo. 4, c. 87, s. 1, signed "*A. B.*, agent for the plaintiff," is sufficient.

Such a notice is sufficient, although it only requires the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of Parliament," without going on to state those purposes in detail. *Doe d. Beard v. Roe*, 360

III. In particular cases—For tin-bound.

A consent-rule, in an ejectment for lands and mines, by which the party appeared to defend for "a certain tin-bound, (setting out its abutments), containing a certain mine, &c.," was held insufficient, on the ground that ejectment will not lie for a tin-bound.

The defence should be for the mine which the defendant is working under the tin-bound. *Doe d. Earl of Falmouth v. Alderson*, 210

EVIDENCE.

See BILLS AND NOTES, II. IV.

1. A broker gave the following bought and sold notes:—1. "We have this day bought for your use, from *J. O. B.* 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash at fourteen days from delivery, less 2½ per cent. discount: the above oil to be delivered from the *Speedy* or *Charlotte*, expected to arrive about November or December next." 2. "We have this day sold for your use, payment

EVIDENCE.

in fourteen days by cash, less $2\frac{1}{2}$ per cent. discount, from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, *ex Speedy and Charlotte to arrive* :—*Held*, that evidence of mercantile usage was admissible to explain all the variances between these notes; and that, being so explained, the variances were not material, and did not avoid the contract. *Bold v. Rayner*, 343

2. *Assumpsit* for goods (a machine) sold and delivered :—*Held*, that the defendant might shew under the general issue, that the machine was manufactured by the plaintiff for the defendant, under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant.

Held, also, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the *quantum valebat*, without shewing some new implied contract arising from the defendant's dealing with the goods. *Grounsell v. Lamb*, 352

3. A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miners' jury were called, and they should say that the shaft was his, he would pay for the horse. A miners' jury was accordingly called, and they found in writing that the shaft was his :—*Held*, that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case to recover compensation for the loss of the horse.

Held, also, that as the document in question did not, on the face of it,

FALSE REPRESENTATION 779

appear to be an award, it need not be stamped as an award. *Sybray v. White*, 435

4. An attorney is not compellable to state, when examined as a witness, whether a document shewn to him by his client, in the course of a professional interview, was then in the same state as when produced on the trial; *e.g.* whether it was then stamped or not. *Wheatley v. Williams*, 533

5. Covenant on a mortgage deed. Pleas—*non est factum*, and that the deed had been fraudulently altered after its execution, by *A.*, one of the attesting witnesses. The execution of the defendant appeared to be attested by two witnesses, *A.* and *B.* *A.* was dead. *B.*, being called, denied all recollection of having attested the deed, and doubted the genuineness of his own and the defendant's signatures. The handwriting of *A.* and of the defendant was then proved by other witnesses. It appeared that the sum secured was written over an erasure :—*Held*, that the defendant could not give evidence of declarations by *A.*, tending to shew that he had forged or fraudulently altered the deed. *Stobart v. Dryden*, 615

EXECUTION OF DEED.

See EVIDENCE, 5.

FACTOR.

See PRINCIPAL AND FACTOR.

FALSE REPRESENTATION.

Action against the defendant for falsely representing that the life interest of *A. B.* in certain trust funds, of which the defendant was trustee, was charged with only three annuities, whereby the plaintiff was induced to advance a sum of money for the purchase of an annuity from *A. B.*, secured by his bond, &c., and also by an assignment of such trust funds;

whereas the defendant, at the time he made such representation, well knew that the same funds were also charged with a mortgage for 20,000*l*. It appeared on the trial that the representation in question was made, if at all, by parol:—Lord *Abinger*, C. B., and *Gurney*, B., were of opinion that this was a representation concerning or relating to the credit and ability of *A. B.*, so as to come within the 9 *Geo.* 4, c. 14, s. 6; *Parke*, B., and *Alderson*, B., were of opinion that it was not. *Lyde v. Barnard*, 101

GOODS SOLD & DELIVERED.

See PLEADING, I. 3; II. 1.

1. The plaintiff agreed to let (or *lend*) the defendant a musical snuff-box, on the understanding that if it were damaged, the defendant was to have it and pay for it; and 3*l*. 10*s*. was to be taken as its value. The defendant received the box accordingly, and it was damaged while in his possession:—*Held*, that the plaintiff was entitled to maintain an action for goods sold and delivered to recover the 3*l*. 10*s*. *Bianchi v. Nash*, 545

2. *A.*, a dealer in china, being insolvent, assigned his business and his stock in trade to his brother *B.*, who was a carver and gilder, and entered into a composition with his creditors to pay them 5*s*. in the pound; his brother *B.* undertaking to pay 2*s*. 6*d*. in the pound, and he himself the remainder. *A.* continued to manage the business in the shop for his brother, *B.*'s wife occasionally going there, and *B.*'s name appearing over the door. One of *A.*'s creditors applied to him at that shop, and pressed for payment of his share of the composition. *A.* offered a bill of exchange in payment, on which the brother's name had been put, but without his authority, as indorser, and

as the amount exceeded the amount due for the composition, *A.*, and *B.*'s wife, who was then in the shop, proposed that goods should be supplied to the shop for the amount of the balance, which was agreed to, and goods were accordingly sent to the amount of the balance. The bill having been dishonoured, *B.* was sued, and pleaded that he never indorsed the bill, and that no notice of dishonour had been given to him; and the jury found both those issues in his favour. Evidence was given that *B.* had held himself out as responsible for all orders given at that shop. The jury found that *A.* had a general authority to buy goods for *B.*, and that the plaintiff did not sell the goods on the credit of the bill alone, but on the credit of *B.*:—*Held*, that the value of the goods sent was recoverable on a count for goods sold and delivered, in the action against *B.* *Rose v. Edwards*, 734

INFANT.

See WARRANT OF ATTORNEY.

INSURANCE.

A suppression or false representation of facts, material to be known by the insurers, vitiates a policy of insurance, although it was in answer to a *parol* inquiry, and the policy is, by the articles of the insurance office, to be void on false answers being given to certain *written* inquiries.

Therefore, where a party, going to insure her life for two years, gave false answers to verbal inquiries whether she had effected similar insurances at other offices:—*Held*, that the policy was thereby avoided.

Quære, whether a party may insure his life for the benefit of another, who provides the funds to pay the premiums, and intends to take the benefit of the policy. *Wainwright v. Bland*, 32

INTEREST.

INTEREST.

See ATTORNEY, IV.

IRELAND.

Ireland is still a place beyond the seas, within 4 *Anne*, c. 16, s. 19, notwithstanding the Act of Union, and the 3 & 4 *Will.* 4, c. 42, s. 7. *Lane v. Bennett*, 70

LANDLORD AND TENANT.

1. Ejectment for a forfeiture. *A.*, by an agreement in writing, let to *B.* a house at the rent of 60*l.* a year, to be paid quarterly; and *B.* agreed, within three calendar months, to erect a shop-front, and otherwise repair, paint, paper, and white-wash the house. And it was further agreed, that, if *B.* did not erect the shop-front within three months, it should be lawful for *A.* or his agents to retake possession of the premises, and the agreement should be null and void. *B.* continued in the possession of the premises, and enlarged the window, but, as the plaintiff contended, did not erect a shop-front. It appeared also, that, after a quarter's rent had become due, and after the expiration of three months from the date of the agreement, *A.*'s son, the father being too ill to attend to business, made a demand of a quarter's rent, which *B.* offered to pay, if he would indemnify him for a sum which he had paid as a penalty to *A.*'s lessor for carrying on a trade in the premises, which was refused. At the trial, *B.*, the defendant, contended that he had made a shop-front which answered the purposes of his trade; and he offered to shew that *A.* held the premises under a lease from *C.*, which contained a clause imposing a penalty upon the lessee, if he allowed a trade to be carried on upon the premises; from which it was to be inferred that the words *shop-front*, in the agreement,

LANDLORD AND TENANT. 781

were used in a peculiar sense; but this evidence was rejected:—*Held*, that such evidence was clearly inadmissible to explain the meaning of the words *shop-front*, in the agreement.

Held, also, it not having been proved that *A.* himself had had any notice of the nature of the alterations, that the son had not sufficient authority to waive the forfeiture.

Quære, whether the demand of rent which became due subsequent to a forfeiture, amounts to a waiver of the forfeiture.

Held, also, that the proviso in the agreement, that it should become "null and void," made it a lease voidable only at the election of the lessor. *Doe d. Nash v. Birch*, 402

2. A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it,—is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. *Hutton v. Warren*, 466

3. A tenant of a farm required that his rent might be reduced; the landlord refused: whereupon the tenant gave a notice to quit at *Michaelmas*, 1834. It was afterwards agreed that he should continue to hold on at a reduced rent, the notice continuing in force, until *Michaelmas*, 1835. Before that time arrived, the tenant offered to continue on as tenant at a

certain rent, whereupon the landlord's agent wrote a letter, stating that the landlord had directed him to inform the tenant, that he could only consent to his offer as to the rent, from *Michaelmas* next to *Michaelmas*, 1836; provided he, the lessor, "could not find a tenant for it at the rent it appeared to him (the agent) to be worth, by the 1st of August." One C. having applied for the farm, the tenant refused to allow him to go over it, and C. made no offer:—*Held*, that it was an implied condition of the agreement, that the tenant should allow persons applying for the farm to go over it; and that condition not having been performed by him, the contract was at an end. *Doe d. Marquis of Hertford v. Hunt*, 690

4. A tenant who occupied a house as tenant from year to year, entered into the following agreement with his landlord:—"1831, *Sept. 2.* S. S. (the tenant) purchased an estate in the parish of *Corbey*, bought of R. G. (the landlord) at the sum of 100*l.* Received on account, 10*s.* Mr. R. G. is willing to let the sum lie, by paying 4 per cent." *Held*, that as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law.

A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase money, the agent of the lessor applied to him to give up possession. To which he answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it:"—*Held*, that this was no disclaimer; because it was not a claim to hold the estate on a

ground necessarily inconsistent with the continuance of the tenancy from year to year. *Doe d. Gray v. Stanion*, 695

LEASE.

(1). *By Incumbent.*

If an incumbent contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of his contract.

A contract provided, that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—*Held*, that it was not necessary to aver that a lease was tendered to the lessor for execution.

The declaration set out the agreement in terms; it contained words of present demise for fourteen years, but stipulated also for the execution of a future lease:—*Held*, that the declaration need not allege expressly what the agreement amounted to in law—whether it was an actual demise, or only an agreement for a demise. *Price v. Williams*, 6

(2). *Inspection of by Lessor.*

Where a lease is executed by both the lessor and lessee, and the lessee assigns it by way of mortgage, the lessor, having no counterpart, is entitled, on an ejectment brought for a forfeiture, to compel the mortgagee to allow an inspection, and give a copy of the lease. *Doe d. Morris v. Roe*, 207

(3). *For Lives, duration of.*

By an indenture of lease certain premises were demised to M. E. and her heirs, *habendum* to her and her heirs for and during the natural lives of M. E.'s son, J. E., her daughter M. E., and A. E.'s granddaughter, and the life of the survivor of them. A. E. had a daughter, but he had not

LEASE.

any granddaughter at the time of making the indenture, nor previously thereto, though subsequently he had several granddaughters:—*Held*, that the lease was good for the lives of *J. E.* and *M. E.* only. *Doe d. Pemberton and Others v. Edwards*, 553

LEGACY DUTY.

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest "among poor pious persons, in ten or fifteen pounds, as they should see fit." *Attorney-General v. Nash and Others*, 237

LIBEL.

In libel, one of the counts set forth the following passage of a letter from the defendant to one *P.*—"I have reason to suppose that many of the *flowers* of which I have been robbed are growing upon your premises," (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants, roots, and flowers* of the defendant, and had unlawfully disposed of them to *P.*, and unlawfully placed them in *P.'s* garden). The previous part of the letter stated, that the plaintiff, whom *P.* had taken into his employ as a gardener, had been in the defendant's service in the same capacity, and had been discharged for dishonesty:—*Held*, on error, that the innuendo was not too large, and that the count was good. *Williams v. Gardiner*, 245

LIMITATIONS, STATUTE OF.

1. A declaration by an executrix stated, that, after the death of the testator, to wit, on the 1st of October, 1832, the defendant was indebted to the plaintiff, as executrix, in 11*l.* for goods sold and delivered by the testator in his lifetime to the defendant,

LIMITATIONS, STAT. OF. 783

and in consideration thereof, and that plaintiff, as executrix, had agreed with the defendant to accept a suit of clothes, to be made by him for *J. R.*, the plaintiff's servant, in part discharge of the debt, (the plaintiff being indebted to *J. R.* in a greater amount for wages, and *J. R.* having agreed and being willing to receive the clothes in part payment), and had also agreed to forbear and give the defendant a reasonable time for the payment of the remainder of the debt, the defendant undertook and promised the plaintiff, as executrix, to make and provide the said suit of clothes for *J. R.* within a reasonable time, and to pay her the remainder of the debt after a reasonable time for such forbearance. The declaration then averred, that though a reasonable time had elapsed, &c., the defendant had not made or provided the clothes, or paid the residue of the debt. *Plea*, that the debt, in consideration of which the said promise was made, did not, nor did any part thereof, accrue to the testator within six years next before the commencement of the suit, and that such promise was by words only. On special demurrer:—*Held*, that the agreement stated in the declaration was only an agreement for an accord, and did not extinguish the original debt, which, therefore, was barred by the Statute of Limitations. *Reeves v. Hearne*, 323

2. The plaintiffs and *S.* sold a library of books for the defendant, some of which were returned by the purchasers as imperfect. The defendant thereupon wrote to the plaintiffs the following letter, dated the 18th of December, 1827:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay in two years:—" *Held*, first, that this was a promissory note; secondly, that it

was evidence of an account stated, so as to defeat a plea of the Statute of Limitations to a count on an account stated with the plaintiffs and *S.*, in an action brought within six years of the 21st of December, 1829; although *S.* died before that time.

Seemle, that such document, if stamped at the time when it was signed, is within the exception in the 55 Geo. 3, c. 184, s. 10, and may be given in evidence, though stamped with a 1*l*. agreement stamp.

A plea of the Statute of Limitations must conclude with a verification. *Wheatley v. Williams*, 533

MALICIOUS PROSECUTION.

Probable Cause.

A., having reasonable and probable cause for supposing that *B.* made an assault on him with intent to rob him, went for a constable, who, on coming to the place, recognised *B.*, and assured *A.* that he was a respectable man, and that he would be answerable for his coming forward to meet the charge. *A.*, nevertheless, persisted in giving *B.* into custody, and on the following day preferred the same charge against him before a justice, who dismissed it. In an action by *B.* against *A.* for maliciously and without probable cause making such charge before the justice, the Judge stated to the jury, that the plaintiff had reasonable and probable cause for suspicion in the first instance, but that he thought that, on the explanation given by the constable, that reasonable and probable cause ceased; and that, if the jury were of opinion that the defendant was satisfied with such explanation, but persevered in the charge from obstinacy or wounded pride, they should find for the plaintiff:—*Held*, that this direction was wrong; for that, as the facts remained unaltered, the representation of the

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constable could not take away the reasonable and probable cause afforded by those facts. *Musgrove v. Newell*, 582

MALICIOUS TRESPASS ACT.

A constable who takes a party into custody, *bonâ fide* believing that he has committed an offence against the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, is entitled, under the 41st section, to notice of action, although he did not see the alleged trespass committed, and there is no proof of any complaint made to him by the owner of the property injured. *Ballinger v. Ferris*, 628

MASTER AND SERVANT.

In an action by an assistant surgeon for wages, it was proved that the plaintiff had served the defendant for nearly half a year, and that payments were made during that time on account of wages, but not according to any yearly amount, or at any definite periods of the year. The plaintiff afterwards fell ill and was taken to a hospital, and after his recovery did not return to his employment, nor did the defendant require him to do so:—*Held*, that there was no evidence of any hiring for a year, and that the plaintiff was entitled to recover wages on a *quantum meruit* for the time he served. *Bayley v. Rimnell*, 506

MONEY PAID.

A., being in want of some harness, went to *B.*, accompanied by *C.*, and ordered some, *C.* saying, in *A.*'s presence, that he would pay the money if *A.* did not:—*Held*, that *C.* thereby acquired an authority to pay the money on the default of *A.*, and that having paid it, he was entitled to recover it back from *A.*, the authority not being shewn to have

been countermanded. *Alexander v. Vane*, 511

MUNICIPAL CORPORATION ACT.

A declaration for a penalty under the 5 & 6 Will. 4, c. 76, s. 54, for bribing a voter in the election of councillors, by "corruptly promising to give him employment in hauling stones at certain hire, as and for a reward to give his vote for" particular candidates, was held good on demurrer; for an *employment* is a *reward* within the latter as well as the former branch of that section: and whether the employment in the particular case was given by way of corrupt bargain, was a question for the jury, but the *Court* must assume that such was the case, a corrupt agreement being sufficiently alleged in the declaration.

Held, also, that an allegation that an election of councillors took place under the act, and that the defendant, not regarding the statute, corrupted the party to vote in such election, was a sufficient statement that the offence was committed after the passing of the act. *Harding v. Stokes*, 354

NOTICE OF ACTION.

See MALICIOUS TRESPASS ACT.

OUTLAWRY.

Where a defendant was beyond seas at the time of the awarding of the exigent in outlawry, the outlawry will be reversed on payment of costs, and on bail being put in in the alternative in the original suit, as in the *C. P.*

Where the *capias* was issued with a direction to the sheriff to return it *non est inventus*, but it appeared also that a judge's order was obtained to return it in fifteen days, and that the defendant went abroad on the same day on which the writ was put into

the sheriff's hands, to avoid his creditors; the Court refused to set aside the outlawry on the ground of such direction to the sheriff, except on payment of costs. *Levi v. Claggett*, 547

PARTICULARS OF DEMAND.

1. The Court will not compel a plaintiff, suing for the balance of an account, to furnish a statement of monies received by him from the defendant. *Penprase v. Crease*, 36

2. In *assumpsit*, the first count of the declaration was on an undertaking by the defendant to pay such costs, charges, and expenses, as the plaintiff (an attorney) should incur in an action to be brought by him against *G.* on a bill of exchange drawn by the defendant on *G.*, which was lying due, and which the plaintiff had agreed to take up for the honour of the defendant. In the second count the plaintiff declared as indorsee of the bill; the third was for money paid; the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate issue was, whether a bill subsequently given by the defendant to the plaintiff was given in satisfaction, or as a collateral security.

The plaintiff first gave a particular of demand applicable only to the count on the bill of exchange. The defendant obtained an order for particulars "of the bill of costs, charges, and expenses mentioned in the first count of the declaration:" and the plaintiff thereupon delivered a particular, containing a copy of his whole bill of costs in the action against *G.*, and also the amount of the bill and interest. At the trial, the Judge ruled that the costs out of pocket only could be recovered on the first count: —*Held*, that the particulars were suf-

ficient to enable the plaintiff to recover the rest of the bill of costs under the account stated.

The defendant gave in evidence, for the purpose of proving that the second bill was given by way of satisfaction, an unsigned account of the plaintiff's claims, which had been delivered by him to the defendant for the purpose of their being proved under *G.*'s bankruptcy; and one item of which was the amount of the bill of costs:—*Held*, that this was not such evidence of an account stated as would have enabled the plaintiff to recover the costs on the account stated, if his particulars had been insufficient for that purpose. *Fisher v. Wainwright*, 480

3. The plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands by the plaintiff and *R.*, and won by the plaintiff of *R.*:—*Held*, that he could not recover the amount of his own stake, on proof that he had re-demanded it from the defendant before it was paid over. *Davenport v. Davies*, 570

4. The Court will not compel a plaintiff suing for the breach of an agreement, and assigning by way of special damage that he has incurred certain expenses, to furnish particulars of such special damage. *Retallick v. Hawkes*, 573

PARTNERSHIP.

See CONTRIBUTION.
PLEADING, II. (2).

PAUPER.

See Costs, (1).

PAYMENT.

Where it appeared that a sum of money had been paid to the plaintiff after action brought, and there was no plea of payment, the Court, on motion,

the payment not being denied, allowed the damages to be reduced by that sum. *Quære*, whether payment either before or after action brought is admissible in evidence in reduction of damages? *Richardson v. Robertson*, 463

PAYMENT INTO COURT.

See PLEADING, II. 3.

PENALTY.

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated that in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work 5*l.* weekly and every week, such penalty to be deducted from the amount which might remain due on the completion of the work:—*Held*, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or recover it. *Duckworth v. Alison*, 412

PLEADING.

See BILLS AND NOTES, I., IV. 3, V.

BOND, 1, 3.

EVIDENCE, 2.

LEASE, 1.

LIBEL.

LIMITATION, STATUTE OF.

PRESCRIPTION ACT.

RESCISSION OF CONTRACT.

SET-OFF.

SLANDER OF TITLE.

TRESPASS.

TROVER.

WORK AND LABOUR.

I. Declaration.

(1). *Correspondence with Process.*

If a plaintiff makes an affidavit of debt against two defendants, and is-

sues a *capias* against both, but declares against one only, it is irregular.

Where the defendant, in vacation, took out a summons at chambers, to set aside the declaration for such irregularity, which the Judge dismissed, and refused the defendant time to apply to the Court in term, and the defendant then took out a summons for time to plead:—*Held*, that this was not a waiver of the irregularity. *Woodcock v. Kilby*, 41

(2). *Commencement.*

A declaration on a bill of exchange by the payee against the acceptor, which was according to the form given by the rules of *Trinity Term*, 1 *Will.* 4, stated it to be payable three months after date, “which period has now elapsed.” The declaration was demurred to, on the ground that it did not appear that the bill was due at the commencement of the suit. The Court refused to set aside the demurrer as frivolous.

Semble, That since the Uniformity of Process Act, the above form is incorrect. *Abbott v. Aslett*, 209

(3). *In Assumpsit.*

A count for goods sold and delivered, stating that the defendant was, on &c., indebted to the plaintiff in &c., for goods sold and delivered by the plaintiff to the defendant at his request, without any further allegation of time:—*Held* good on special demurrer. *Lane v. Thelwell*, 140

(4). *Several Counts.*

1. A declaration contained one count for double rent, on the 11 *Geo.* 2, c. 19, s. 18, and another count for use and occupation. The Court refused a rule to strike out one of the two counts. *Thoroton v. Whithead*, 14

2. A declaration contained one count, claiming a fee or reward, in the name of metage, on coals import-

ed into the port of *Truro*, alleged to be due to the plaintiff as lessee, under the corporation of *Truro*, of an ancient office of meter, to which the fee was stated to be incident; and another count, claiming the same sum as a port duty:—*Held*, that these counts were only different statements of the same subject matter of complaint, within the meaning of the rule of *H. T.* 4 *Will.* 4, and that one of them must be struck out. *Jenkins v. Treloar*, 16

II. *Pleas in bar.*

(1). *Defence under General Issue.*

In *indebitatus assumpsit* or debt for goods sold and delivered, the defendant may prove, under the general issue, that the goods were sold on a credit which had not expired at the time of action brought. *Broomfield v. Smith*, 542

(2). *When bad as amounting to General Issue.*

1. *Assumpsit* for money paid, for interest, and on an account stated. *Plea*, that, at the time of the commencing of this suit, and at the time of the accruing of the causes of action in the declaration mentioned, the plaintiff and defendant carried on business in co-partnership, and that the causes of action arose out of transactions between the plaintiff and defendant as such co-partners; and that, at the time of the commencement of the suit, the accounts of the partnership were not settled or adjusted, or any balance struck between the plaintiff and defendant. On special demurrer:—*Held*, that the plea was ill: *first*, because it did not shew that this was a partnership transaction; *secondly*, nor that the debt was due to the plaintiff and defendant jointly; *thirdly*, that if it was to be taken to be so alleged, the plea was bad as amounting to the general issue. *Worrall v. Grayson*, 166

2. *Assumpsit* for money paid. *Plea*—That the money was paid by the plaintiff to the use of the defendant, in manner thereafter mentioned, and in no other manner, viz. as one-sixteenth part of the damages and costs recovered against the plaintiff, as owner of a vessel of which the defendant was a part-owner to the extent of one-sixteenth share, for the loss of certain goods shipped on board the vessel, and which loss was alleged in the action to have happened through the negligence, &c., of the plaintiff, by his mariners and servants; whereas the loss complained of was not wholly caused by the negligence, &c., of the plaintiff, by his mariners and servants, but that the plaintiff, by his own personal and wilful misconduct, &c., contributed to the loss. The defendant pleaded further, that, although he was the legal owner of one-sixteenth part of the said vessel, yet he, the defendant, did not concur with the plaintiff and the other part-owners in the employment of the vessel in that voyage, but that the said voyage was undertaken and carried on for the profit and advantage of the plaintiff and certain other persons, separate and distinct from the defendant, and without his being concerned or in any way participating in the adventure. On special demurrer:—*Held*, that both pleas were bad, as amounting to the general issue. *Gregory v. Hartnoll*, 183

3. *Assumpsit* for the work and labour of the plaintiff as an attorney. *Plea*, as to all but 90*l.* that the work and labour was performed by the plaintiff in endeavouring to secure the defendant's return to Parliament, on two occasions; under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements; and that no express contract was made between the plaintiff and defendant on the se-

cond occasion, and that 90*l.* was a fair remuneration for the plaintiff's services on that occasion:—*Held* bad, on special demurrer, as amounting to the general issue. *Jones v. Nanney*, 333

4. Debt, in 20*l.*, for a boat sold and delivered by the plaintiff to the defendant. *Plea*, as to 17*l.* 10*s.*, parcel of the said sum of 20*l.*, that the action, as to the said sum of 17*l.* 10*s.*, was brought to recover that sum as being the residue of a sum of 57*l.* 10*s.*, whereof the said sum of 20*l.* was parcel, such sum of 57*l.* 10*s.* being the price of the said boat sold and delivered by the plaintiff to the defendant; that the plaintiff, at the time of the sale, warranted that the boat was sound, and that the defendant, confiding in such promise, bought the boat on the terms aforesaid, and then paid to the plaintiff the sum of 40*l.* in part and on account of the boat. The plea then averred that the boat, at the time of the sale and warranty, was unsound, and was not then worth more than the 40*l.* which had been and was so paid to the plaintiff for the same; and that the defendant incurred an expense exceeding 17*l.* 10*s.* in putting her into a sound state:—*Held* bad on special demurrer, as amounting to the general issue. *Dicken v. Neale*, 556

(3). *Plea of Payment into Court.*

Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into Court of one entire sum, in satisfaction of all the counts or breaches. *Marshall v. Whiteside*, 188

(4). *In particular Cases.*

1. *Assumpsit* against two defendants, *S.* and *M.*, for money had and received. *Plea*, as to 25*l.*, parcel

&c., that on &c., the defendants were carrying on business in partnership, and employing many servants; that while they were such partners, the plaintiff deposited with them, as such partners, the said sum of 25*l.*, as a security for his faithfully accounting for all monies received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, and it was thereupon agreed between them that the defendant *S.* should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant *M.* should take upon himself the payment of other debts, and retain in his employ others of the servants; and that, in pursuance of such agreement, *M.* took upon himself the payment of the 25*l.* to the plaintiff, and retained the plaintiff in his sole employ; that the plaintiff had notice of all the premises, and assented to such agreement and retainer by *M.*, and in consideration thereof discharged *S.* from his promise as to the 25*l.*

Replication, that *M.* did not retain the plaintiff in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c., and issue thereon.

After verdict for the defendant on this issue:—*Held*, that the plaintiff was entitled to judgment *non obstante veredicto*, on the ground that no contract was shewn which made *M.* solely liable to the plaintiff. *Thomas v. Shillibeer*, 124

2. The condition of a bond recited a dissolution of partnership between the plaintiff and *I.*, in which was recited an agreement, that, subject to the adjustment of the partnership accounts as in the deed mentioned, the stock in trade and partnership effects should belong absolutely to *I.*, and all debts due from the partnership should be paid by *I.*; and that *I.*,

and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts; and the condition was, that *I.* and the defendant, or one of them, should indemnify the plaintiff against the payment of the said partnership debts, and all costs, &c., and all actions to be brought in respect thereof. To a declaration on this bond, which set out the condition, and a breach of it in non-payment of a debt due from the partnership to *M.*, who in consequence sued the plaintiff and *I.* for it, the defendant pleaded, that if the plaintiff was damaged, it was through his own default:—*Held*, that under this plea the defendant could not give in evidence the deed of dissolution, to shew that it contained certain stipulations as to the adjustment of the accounts, which the plaintiff had not performed, not having paid over to *I.* a balance alleged to be due to the latter on such adjustment.

Held, also, that the defendant could not shew, in reduction of damages, that the costs of *I.*'s defence to the action brought by *M.*, were much less than the costs incurred by the plaintiff. *White v. Ansdell*, 348

3. In a declaration on a 'charter-party, by which the ship was to sail from *Hamburgh*, being tight, staunch, strong, and every way fitted for the voyage, in the course of the next *November*, and proceed to *Lima*, and having discharged her outward cargo, forthwith to be made ready, and proceed to *Costa Rica*, and there take on board a cargo, and then proceed to *Liverpool*,—breaches were alleged as follows:—That the vessel was not in *November*, or afterwards, until or when she sailed, to wit, on the 20th of *December*, tight, staunch, strong, or in any way fitted for the voyage; and that though she did then sail from *Hamburgh*, yet by reason of her not

being tight, &c., when she so sailed, she was obliged to, and did, put back into *Altona*, and was detained there for a long time, to wit, until, &c.; though she did then again set sail on her voyage from *Altona*, she did not proceed on the voyage according to its due course, or with proper despatch, but was unnecessarily delayed, and deviated, &c., &c.; by means of which several premises the vessel did not arrive at *Lima* until &c., and the plaintiff lost the benefit of a homeward cargo from *Costa Rica*, &c. The defendant pleaded, (amongst other things), as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into *Altona*, and being detained there for such time as was necessary to put further ballast on board, payment into Court of 1s. and no damages *ultra*; and as to so much as related to her being detained at *Altona* beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, &c., *modo et forma*:—*Held*, on special demurrer, that the latter plea was bad, as answering only a part of the breach to which it applied, *viz.* the detention at *Altona*, and the subsequent delay and deviation; even if that *was* a breach, and was not merely a statement of special damage. *Porter v. Izat*, 381

4. In an action on the case for a false return, the declaration alleged that the defendant *seized and took in execution* divers goods and chattels of the value of the monies directed to be levied as aforesaid, and *then levied* the same thereout. The defendant pleaded that he did not seize or take in execution any goods or monies, and levy the monies directed by the said writ to be levied, *modo et forma*:—*Held*, that the plea was bad, as the issue tendered was too large. *Stubbs v. Lainson*, 728

(5). *Conclusion.*

Debt for goods sold and delivered. *Plea*—that before the commencement of the suit, and when the said sum of 20*l.* became due and payable, to wit, on &c., the defendant paid the plaintiff the said sum of 20*l.* according to the defendant's said contract and liability; concluding to the country:—*Held* bad on special demurrer, for not concluding with a verification. *Goodchild v. Pledge*, 363

III. *Replication.*(1). *De injuriâ, when applicable.*

Assumpsit by the indorsee against the maker of a promissory note for 250*l.*, payable three months after date to the maker's order, and by him indorsed to one *H. R.*, who indorsed it to the plaintiff. The plea began by stating that an advertisement had been inserted in a newspaper offering money to be lent upon personal security, on application to Mr. *A.*, 12, *Fludyer Street, Westminster*, and that, in consequence of that advertisement, the defendant called at that place, and saw *A.*, and in consequence of representations made to him by *A.*, he (the defendant) was induced to and did draw and deliver to *A.* two promissory notes, by each of which the defendant promised to pay to his own order the sum of 250*l.*, three months after the date thereof (one of them being the note in the declaration mentioned), upon the faith of, and promise from *A.*, that the said notes should be renewed when due, for the space of two years, and that he should receive from the said *A.* on a certain day, to wit, the *Friday* then next following, being, to wit, the 1st of *May*, 1835, the amount of the said notes, deducting discount and stamp. And the defendant averred that the said *A.* did not, either on *Friday*, the 1st of *May*, 1835, or at any other time, although often requested, pay to the

defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but on the contrary thereof, that he, the said defendant, on the said 1st of *May*, 1835, by appointment of the said *A.*, went to the said place, to wit, 12, *Fludyer Street*, but the said *A.* was not, nor was any such person, either then or at any time afterwards, there to be found; and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was any consideration or value on the said note between any parties thereto. The plea then went on to aver that *H. R.* and the plaintiff, at the respective times when the note was so indorsed to them respectively, were privy to, and had full knowledge and notice of the said transaction in the plea detailed, and of the said fraud and imposition; concluding with a verification.—To this plea the plaintiff replied, *de injuriâ*:—*Held*, on special demurrer, that the replication was good, inasmuch as the plea amounted only to matter of excuse for the non-performance of the promise, and to one ground of defence only. *Isaac v. Farrar*, 65

(2). *Duplicity.*

Debt for money lent and money paid. The plea first alleged, that the sums so lent and paid were lent for the purpose of paying, and were paid, to *J. R.*, the master of a ship then in a foreign port, for the repairs of such ship, and not on the security or liability of the defendant; and then went on to state an agreement made in such foreign port, between the plaintiff and *J. R.*, for the defendant, for bottomry, and a bottomry-bond given by *J. R.* to the plaintiff, in pursuance of such agreement; by means of which

it was alleged that the plaintiff desired to obtain exorbitant interest for his advances. The replication alleged, *first*, that the money was lent and paid on the security and liability of the defendant; *secondly*, that there was no such agreement, and, *thirdly*, that there was no such bond, as was stated in the plea:—*Held*, on special demurrer, that the replication was bad, for tendering issues on several matters, having, by the first allegation put in issue the whole substantial matter of defence. *Regil v. Green*, 328

POOR LAWS AMENDMENT ACT.

See BASTARD.

PRACTICE.

I. *Staying proceedings.*

1. The Court will not stay the *postea* in the hands of the associate, after verdict for the plaintiff, on affidavits shewing a strong probability that the plaintiff was dead before the trial; such facts must be shewn as would be evidence of the death before a jury. *Johnson v. Hamilton*, 149

2. Where a defendant obtains a rule which stays the plaintiff's proceedings, he is entitled to the whole of the day on which such rule is disposed of for taking the next step. *Vernon v. Hodgins*, 151

II. *Form of Issue.*

Where an issue had been delivered in the usual form, as for a trial at *Nisi Prius*, and the plaintiff subsequently obtained a Judge's order to have the cause tried before the sheriff; and this order, with notice of trial, having been served:—*Held*, on motion to set aside the issue, that it was irregular, as it ought to have been made up in the form of an issue to be tried before the sheriff, and that, it having been delivered before the

Judge's order was obtained, the plaintiff ought to have taken out a summons to amend the issue. *Ward v. Peel*, 743

III. Notice of Trial.

1. Countermand of notice of trial, in a country cause, may be given by the country attorney, although the agent in town is the attorney on the record. *Cheslyn v. Pearce*, 56

2. The notice of trial by continuance must be given the same length of time before the notice of trial expires as in the case of a notice of countermand. *Forbes v. Crow*, 465

IV. Judgment.

(1). *As in case of nonsuit.*

1. Judgment as in case of a nonsuit cannot be obtained in a cause which has been once tried, though the trial was before the sheriff.

The defendant should move to discharge the writ of trial, and then take the cause down by proviso. *Day v. Day*, 39

2. In discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking, the Court will order payment of costs of the day, "if any," although the defendant's affidavit do not shew that any costs have been incurred.

But not where his affidavit shews that none could have been incurred; as where it states that notice of trial was duly countermanded. *Doe d. Humphreys v. Owen*, 322

3. Though the plaintiff, where his pleading concludes to the country, may now add the *similiter* without ruling the defendant to rejoin: if he does not do so, the defendant must add the *similiter* before he can move for judgment as in case of a nonsuit. *Brook v. Lloyd*, 552

(2). *For want of plea.*

If a plaintiff treats a plea as a nullity, and signs judgment as for want

PRESCRIPTION ACT.

of a plea, he so treats it for all purposes, and cannot afterwards say that it was merely irregular, so as to be a waiver of the demand of a plea. *Hough v. Bond*, 314

(3). *Revival of, by scire facias.*

The affidavit of the existence of the debt, on which to ground a motion for a *scire facias* to revive the judgment, ought either to be made by the plaintiff himself, or by some person who was his attorney at the time of the judgment. *The Duke of Norfolk v. Leicester*, 204

V. *In error.*

A common joinder in error to a special assignment of errors need not be signed by counsel.

It is not a ground of error *coram vobis*, that the writs of *venire facias*, and *distringas juratores*, are returned with only one panel annexed successively to both writs. *Archbold v. Smith*, 740

PRESCRIPTION ACT.

A claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse, within the 2nd section of 2 & 3 Will. 4, c. 71.

In a plea under the statute 2 & 3 Will. 4, c. 71, it is sufficient to allege that the user had existed for forty years *before the commencement of the suit*, and it need not be alleged to have been for forty years before the act complained of in the declaration.

A replication of a life estate to a plea of enjoyment for forty years, under the statute 2 & 3 Will. 4, c. 71,

must shew that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate. *Wright v. Williams*, 77

PRINCIPAL AND FACTOR.

A factor was employed to sell a cargo of goods consigned to him, and on the 6th of February sold to *A.* one parcel of the goods, and delivered to him an invoice in his own name. On the 13th, *A.* applied to purchase another parcel, but some difference occurring as to the price, the factor said he must write to his principals. He did so, and on the 20th informed *A.* of their answer. *A.* bought the goods at the price named by the principals, and the factor delivered to him an invoice and a bought note in the names of the principals; the payment to be at four months in cash. On the same day, and on other occasions within that period, *A.* made payments to the factor, not expressly on account of these goods. It appeared that it was the factor's practice, when he sold goods on his own account, to pay himself advances, to deliver an invoice in his own name; when he sold merely as a broker, to deliver a bought note. In an action by the owners of the goods against *A.* for the price of the parcel sold on the 6th February, the jury found that the factor communicated to *A.* that he sold the goods for other persons as principals, but that *A.*, until the 20th February, bona fide believed that he sold to pay himself advances; and that, using the ordinary precaution of merchants, *A.* was not bound to make further inquiry:—Held, that *A.* was entitled to set off in this action the payments made by him to the factor. *Warner v. McKay*, 591

PROCESS.

(1). Description of defendant in.

"*T. S.* a clerk in the Army Pay

Office, Somerset House, in the city of Westminster and county of Middlesex:"—Held not to be a sufficient description of the defendant in a *capias*. The blank following the word "of" in the form given by the Uniformity of Process Act, must be filled up with the place of the defendant's actual or supposed residence, or, if the plaintiff have no knowledge of these, with the place where the defendant is or is supposed to be; in conformity with the directions given in sect. 1, as to the writ of summons. *Rolfe v. Swann*, 305

(2). Indorsement on.

The following indorsement on a *capias* was held irregular:—"This writ was issued by *W. L.*, 32, Great James-street, Bedford-row, agent for the plaintiff in person, who resides at Barmouth." *Lloyd v. Jones*, 549

(3). Service and Execution of.

1. If such circumstances be shewn as satisfy the Court that the process has come to the possession of the defendant, that is a sufficient personal service, within the 12 Geo. 1, c. 29. *Williams v. Piggott*, 574

2. The sheriff is bound, since the Uniformity of Process Act, to arrest a defendant as soon as he can after the delivery of the writ of *capias* to him; and has not the four months in which to execute it. *Quære*, whether he is liable to an action for negligence, in not arresting, when he has an opportunity, at the suit of the plaintiff, without proof of actual damage? *Brown v. Jarvis*, 704

(4). Return of.

A plaintiff having recovered a verdict at the Summer Assizes, the Judge who tried the cause, under the power given by 1 Will. 4, c. 7, s. 2, made an order that execution should issue forthwith, and a *ca. sa.* was thereupon issued, returnable "immediately after

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execution thereof," pursuant to 3 & 4 *Will.* 4, c. 67, s. 2. This writ having remained in the sheriff's office a considerable time without having been executed, an order was made by a Judge on the 12th of *September*, for the sheriff to return the writ in six days, which order was served upon him on the 14th, and he on the same day returned *non est inventus*, whereupon the plaintiff commenced an action against the defendant's bail:—*Held*, that under these circumstances the bail were not fixed, and that the action was prematurely commenced. *Kemp v. Hyslop*, 58

RECOGNIZANCE.

Although the city of *London* are entitled to forfeited recognizances entered into within the city of *London*, yet the Court will not allow a recognizance to be discharged, though the motion is made with the consent of the city solicitor, unless notice has been given to the Attorney-General. *Ex parte Morris*, 510

RENT, APPORTIONMENT OF.

See DISTRESS, 5.

RENT-CHARGE.

See DISTRESS, 4.

RESCISSION OF CONTRACT.

Assumpsit for goods sold and delivered. *Plea*, that the goods were sold and delivered upon a certain contract, and that afterwards it was agreed between the plaintiff and defendant that the contract should be wholly rescinded and annulled:—*Held*, that the plea was bad. *Edwards v. Chapman*, 231

ST. PANCRAS VESTRY ACT.

The subordinate officers appointed under the *St. Pancras Vestry Act*, 59 *Geo.* 3, c. 39, s. 19, by the select

SLANDER OF TITLE.

vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor (who are annual officers), under s. 57, continue in force after the directors to whom they were given have gone out of office. *M'Gahey v. Alston*, 386

SCIRE FACIAS.

See PRACTICE, IV. (3).

SEQUESTRATION.

To a writ of *capias utlagatum*, the sheriff returned that the defendant had no goods, nor any lay fee within his bailiwick, but that he was a beneficed clergyman; not stating the name or situation of the benefice. The Court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return. *Rex v. Powell*, 321

SET-OFF.

A defendant is not entitled to give evidence of a set-off under a notice of set-off delivered with the plea of *nunquam indebitatus*, since the rules of *Hilary Term*, 4 *Will.* 4; and the Judges were not restrained by the proviso in the 3 & 4 *Will.* 4, c. 42, s. 1, from making the rule of *Hilary Term*, 4 *Will.* 4, requiring that, in all cases, a set-off shall be pleaded. *Graham v. Partridge*, 395

SHERIFF.

See ATTACHMENT, 2, 3.
PROCESS, (3), 2.

SLANDER OF TITLE.

A declaration for words imputing that tulips of the plaintiff, about to be sold by auction, were stolen property, whereby purchasers were deterred from bidding, and the sale was defeated, was held bad in arrest of

judgment, for not setting out the words *verbatim*.

The declaration, having stated that the tulips were about to be sold by auction, alleged that the defendant asserted and represented that *the said* tulips were stolen property:—*Held*, that this was sufficient, without stating that he spoke the words *of and concerning* the said tulips, the property of the plaintiff. *Gutsole v. Mathers*, 495

STAMP.

See EVIDENCE, 2.

LIMITATIONS, STATUTE OF, 2.

Notice being given to the plaintiff of a call on certain mining shares which he had transferred to the defendant, his attorney wrote to the defendant's attorney to inquire whether the defendant was desirous of avoiding a forfeiture of the shares, by authorising the plaintiff to pay the amount of the call. The defendant's attorney wrote in reply, authorising the plaintiff to pay the call:—*Held*, that these letters were not a contract, or evidence of a contract, and did not require a stamp. *Parker v. Dubois*, 30

STOPPAGE IN TRANSITU.

Where goods, consigned to *A.* in London, and deliverable in the river, were by his direction, he being then insolvent, landed on a wharf at which he had been in the habit of landing goods, *A.* having no premises adjoining the river, but having a warehouse in the city; and the goods were stopped *in transitu* in the hands of the wharfinger:—*Held*, in an action of trover for the goods by the assignees of *A.* (who became bankrupt a few days afterwards), against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers received the goods as *A.*'s agents to take possession of

them for his own benefit as owner, or as agents only to forward them to him, or to keep them for the seller.

Held, also, that directions given by *A.* to an agent whom he sent to order the landing of the goods, in which he expressed his intention not to receive them as owner, were admissible in evidence, although they were not communicated to the wharfingers or to the seller. *James v. Griffin*, 20

SURRENDER.

By agreement, dated in *May*, to which *A.*, *B.*, and *C.* were parties, *A.* and *B.* agreed to sell by auction an estate, to which they were entitled as tenants in common, or in default of such sale, that such parts of it as should not be sold after the 1st *August*, and before the 1st *September* following, should be divided into two equal lots between *A.* and *B.*; and that 100*l.* should be paid by *B.* to *C.*, the principal tenant, as a remuneration for his giving up possession of his farm at the *Michaelmas* following; and *C.* agreed to give up possession of his farm accordingly. No part of the estate was sold by the 1st *September*, but some portions were sold subsequently, and the remainder was divided between *A.* and *B.*, but such division was not completed till the following *March*. *C.* continued in possession by the desire of *A.* and *B.*, until that time, and then quitted:—*Held*, that the agreement was not a surrender of *A.*'s term. *Weddall v. Capes*, 50

TENDER.

The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the *Wednesday* following, at 12 o'clock, proceedings would

be commenced. On the *Wednesday*, at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy after referring to the letter-book, refused to accept it, unless the charge for the letter were also paid. It appeared that the writ was issued at 11 o'clock on that day:—*Held*, (*Parke, B., dubitante*), that this was a good tender. *Kirton v. Braithwaite*, 310

TIN-BOUND.

See EJECTMENT, III.

TRANSFER OF DEBTS.

See PLEADING, II. (4).

TRESPASS.

(1). *When maintainable.*

A., being in the custody of the Marshal of the *King's Bench* prison, was brought up to that Court upon an order of the Court, and charged with an attachment for contempt: upon which attachment he was afterwards detained in custody:—*Held*, that trespass was maintainable against the party who caused the order to be served on the Marshal; *dissentiente* Lord Abinger, C. B. *Bryant v. Clutton*, 408

(2). *Pleadings.*

1. Trespass for breaking and entering three closes, describing them by abutments. *Plea*, that *the said closes in which, &c.*, were the closes, soil, and freehold of one *T. L.*, and justifying as his servants.

Replication—That before the said times when &c., and before the said *T. L.* had any thing in the said closes in which, &c., one *R. T.* and his wife, in right of his said wife, one *A. L.*, and one *E. K.*, were seised in their demesne as of fee of and in two undi-

vided third parts, &c., of and in the said closes in which &c., and one *A. R.* was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which &c. And the said *R. T.* and *M.* his wife, being so seised, afterwards, and before the said *T. L.* had any thing in the said closes in which &c., to wit, on &c, at &c., a certain fine was had and levied of, *inter alia*, the parts, shares, and interest of the said *R. T.* and *M.* his wife of and in the said closes in which &c., which fine was then had and levied, *inter alia*, to the use of *P. M. C.* and his heirs, during the life of the said *M. T.*; by virtue of which fine the said *P. M. C.* became seised in his demesne as of freehold, for the term of the life of the said *M.*, of and in the said parts, &c., of the said *R. T.* and *M.* his wife, of and in the said closes in which &c. And the said *P. M. C.*, *A. L.*, *E. K.*, and *A. R.*, being so seised, afterwards, and before the said *T. L.* had any thing in the said closes in which &c., and before the said times when &c., demised to the plaintiff, who thereupon entered and was possessed until the defendants wrongfully broke and entered therein, &c. *Rejoinder*, traversing the seisin of *R. T.* and *M.* his wife, *A. L.*, *E. K.*, and *A. R.*, in the said closes in which &c.; on which issue was joined. At the trial the plaintiff proved a case as to two of the closes, but offered no evidence as to the third:—*Held*, that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the third. *Phythian v. White*, 216

2. Trespass for breaking and entering plaintiff's dwelling-house, and assaulting and imprisoning him, &c. *Pleas*—*first*, not guilty; *secondly*, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* and war-

rant thereon, by virtue of which the defendants entered the house, *the outer door being open*, and arrested the plaintiff. *Replication*, (admitting the writ and warrant), *de injuriâ absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him:—*Held, first*, that the averment in the plea, that the outer door was open, was a material averment, for that the door's being open was a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore, that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door. *Secondly*, that the defendants having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might (even on the plea of not guilty), give damages in respect of all the injuries complained of in the declaration. *Kerbey v. Denby*, 336

3. To a declaration in trespass for an assault and false imprisonment, the defendant pleaded that the plaintiff attempted forcibly to break and enter his messuage or public-house without the leave of the defendant, whereupon he, the defendant, resisted such entrance; and because the plaintiff behaved himself violently and created a disturbance in the street, by which means a mob was assembled and the defendant's business interrupted, and his customers annoyed, and because the plaintiff threatened to continue such violent conduct, and to renew his attempts and efforts to get into the house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his attempts and efforts was complied with, the defendant, in order to preserve

the peace, and to secure himself from a renewal of such attempts and efforts, gave him in charge to a constable, to be carried before a justice of the peace:—*Held*, that the plea was good after verdict. *Ingle v. Bell*, 516

TROVER.

Trover.—The declaration stated that the plaintiff was possessed as of his own property of certain cattle, to wit, four horses, which the defendant converted and disposed of to his own use. Pleas—*first*, that they were not the property of the plaintiff; *secondly*, that a judgment was recovered against *J. F.*, and that the defendant, (a sheriff's officer), seized them under an execution against the said *J. F.*, *the same being the goods and chattels of the said J. F.*, and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff. To which the plaintiff replied, that they were the cattle and property of the said plaintiff *modo et forma*. At the trial, it was found by the jury, that they were the property of the plaintiff and *J. F.* jointly:—*Held*, that the issue raised by the defendant was, whether the cattle were the sole property of *J. F.*, and the jury having found that they were the joint property of the plaintiff and *J. F.*, that the plaintiff was entitled to recover. *Farrar v. Berwick*, 682

VENDOR AND PURCHASER.

Certain leasehold houses were sold by auction, which were described in the particulars and conditions of sale as a well-secured rental with reversionary interest, and as an eligible investment. By the provisions of a local act, for the establishment of the South London Market Company, the

Company were authorized to treat for, purchase, and take the premises in question for the purposes of the act. No notice was given of this liability in the particulars and conditions of sale; and the jury found as a fact that the vendee had no notice of the liability. The conditions contained no express warranty of title:—*Held*, in an action by the vendee against the vendors of the estate, that the plaintiff was not justified in stating this contract in the declaration, as a warranty of a clear title, free from all charges, incumbrances, and liabilities.

Held, also, that the purchaser was entitled to rescind the contract, on ascertaining that the premises were liable to be taken for the purposes of the act. *Ballard v. Way*, 520

VENIRE.

See BOND, 1.

WARRANT OF ATTORNEY.

The Court refused to set aside a warrant of attorney, dated the 1st of August, 1835, on the affidavit of the defendant, that when he gave it, "he was an infant of the age of twenty years or thereabouts," together with proof of his register of baptism, dated in September, 1815. *Weaver v. Stokes*, 203

WITNESS.

(1.) *Commission for Examination of Witnesses.*

1. Where an affidavit in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and

necessary:—*Held* sufficient; and that the affidavit need not state that the evidence was *admissible*, or that the application was *bona fide* and not for delay; and also that no affidavit of merits was necessary. And the Court, in granting such an application, will not impose terms upon the party applying. *Baddeley v. Gilmore*, 55

2. The affidavit on which to ground a motion for a commission to examine witnesses abroad, must either specify the names of the witnesses proposed to be examined, or in some other way describe them. *Gunter v. M'Tear*, 201

(2.) *Competency.*

In support of a plea of payment, the defendant proved the payment of 11*l.* to *H.*, the plaintiff's attorney, on the plaintiff's account. In answer to this the plaintiff tendered *H.* as a witness, to prove that the defendant afterwards called upon him and got the money back again: but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict:—*Held*, that the witness was competent, and that the evidence ought to have been received. *Bowers v. Evans*, 214

WORK AND LABOUR.

A plaintiff cannot recover for *materials* on a count for *work and labour*.

Debt in 20*l.* for work and labour, and on an account stated. Plea, as to all the sum demanded, except 7*l.*, *nunquam indebitatus*; as to the 7*l.*, the defendant suffered judgment by default. The plaintiff proved work done to the amount of 4*l.* 4*s.* 10*d.*, and materials provided to the amount of 8*l.* 4*s.*, but gave no evidence applicable to the account stated:—*Held*, that the defendant was entitled to a nonsuit. *Heath v. Freeland*, 543

WRIT OF TRIAL.

WRIT OF TRIAL.

See PRACTICE, IV. (1), 1.

The writ of trial under the rule of *Hilary Term, 4 Will. 4*, is conclusive as to the date of the writ of summons

WRIT OF TRIAL. 799

stated in it, and evidence is not admissible to contradict it.

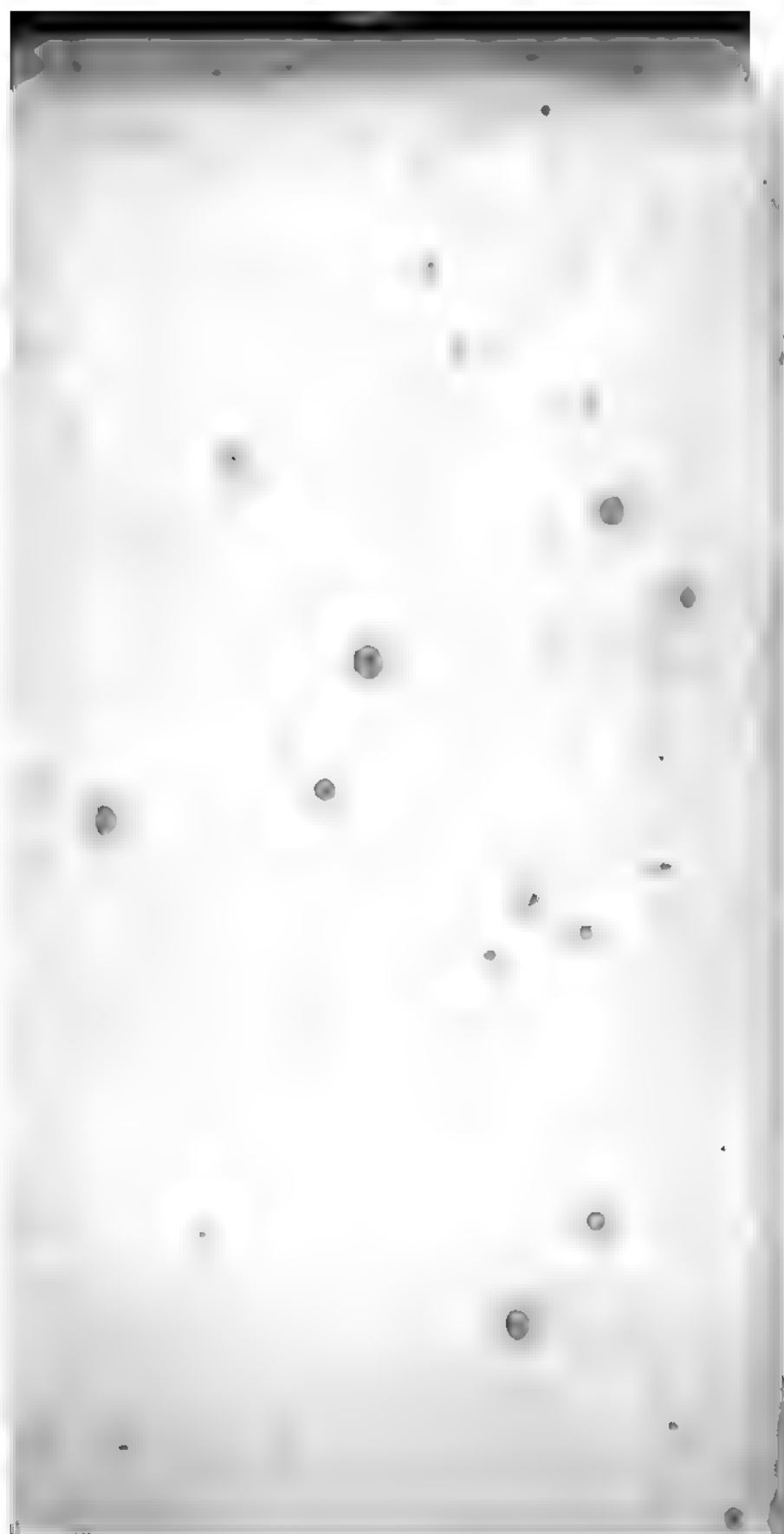
• But where a wrong date is inserted in it, the Court will set aside the trial, and order the writ of trial to be amended. *Whipple v. Manley*, 432

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